No. 2295

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

W. J. MORRISON, FINLEY MORRISON AND SLIGH FURNITURE COMPANY, a corporation,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

TRANSCRIPT OF RECORD.

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Appellee.

Names and Addresses of Attorneys upon this Appeal:

For the Appellants:

R. Sleight, Yeon Bldg., Portland, Ore.

For the Appellee:

C. L. Reames, U. S. Atty., Portland, Ore.

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In the District Court of the United States for the District of Oregon.

Be It Remembered, That on the 24 day of November, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and THE SLIGH FURNITURE COMPANY, a corporation,

Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, Ninth Judicial District: Sitting in Equity.

Comes now the United States of America by Robert F. Maguire, its Assistant United States Attorney for the District of Oregon, in this behalf duly authorized and directed by the Attorney General of the United States and brings this its bill against E. J. Cowlishaw, a citizen and resident of the State of Oregon, W. J. Morrison, a citizen and resident of the State of Oregon, Finley Morrison, a citizen and resident of the State of Oregon, and The Sligh Furniture Company,

a corporation incorporated under and by virtue of the laws of the State of Michigan, and a citizen and resident of said state, and shows unto Your Honors as follows:

I.

The Southwest Quarter, the Northwest Quarter, the South Half of the Northeast Quarter (S½NE¼) and the Southeast Quarter (SE¼), all of Section Sixteen (16), Township Three (3) South, Range Six (6) East of the Willamette Meridian, and each and every parcel thereof, are and have at all times been a part and parcel of the public domain of the plaintiff.

II.

On to-wit the 16th day of December, 1905, the Secretary of the Interior by proclamation withdrew temporarily from entry, settlement, sale or other disposal, except under the mining laws of the United States, all of said lands, together with large quantities of other lands of plaintiff's public domain contiguous to and in the vicinity thereof, for forest purposes.

III.

On the 25th day of January, 1907, the President of the United States, acting under and by virtue of the power vested in him by law, by executive proclamation established the Cascade Range Forest Reserve, Oregon, and included therein by said executive proclamation, each and every part, portion and parcel of said lands.

IV.

On January 2, 1902, a field survey of said land was made but said survey was not accepted and approved

by the Commissioner of the General Land Office of the United States until January 31, 1906, and at all times prior to the said 31st day of January, 1906, the said lands were unsurveyed, public lands of the plaintiff and part of its public domain.

V.

The plaintiff, the United States of America, claims and holds the title in fee to each and every of said parcels of land.

VI.

The defendant, E. J. Cowlishaw, claims an interest and estate in the Southwest Quarter (SW¼) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, of said lands, under, through and by virtue of a pretended certificate and contract from the State of Oregon, described as follows: Certificate No. 15210, dated January 8, 1907; and which said pretended claim, estate and interest, is without any right whatsoever, and the defendant E. J. Cowlishaw has no estate, right, title or interest whatsoever in said land or in said premises or any part thereof.

VII.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the Southeast Quarter (SE¼) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, under, through and by virtue of a deed executed by Robert F. Louden, which said deed is of date the 10th day of October, 1906, and pretends to convey to the said defendants last above named, the

Southeast Quarter (SE¼) of said Section Sixteen (16) in said township and range, which said pretended claim, estate and interest, is without any right whatsoever, and the defendants Finley Morrison and W .J. Morrison, have not and neither of them have any estate, right, title or interest in said lands or premises or any part thereof.

VIII.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South Half of the Northeast Quarter (S½NE¼) and the Northwest Quarter of the Northwest Quarter (NW¼NW ¼) of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, under and through a deed executed by Alvira S. Louden, of date January 9, 1907, which said deed pretended to convey the said lands thereof to the said Finley Morrison and W. J. Morrison; and which said pretended claim, estate and interest is without any right whatsoever, and the defendants Finley Morrison and W. J. Morrison have not and neither of them have any estate, right, title or interest whatsoever in said land or premises or any part thereof.

IX.

The defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South Half of the Northwest Quarter (S½NW¼), and the Northeast Quarter of the Northwest Quarter (NE¼ NW¼) of Section Sixteen (16) in Township Three (3) South, Range Six (6) East of the Willamette Meridian, under, through and by virtue of a deed execut-

ed by Charles E. Powell, of date January 15, 1910; which said deed pretended to convey the said lands to the said Finley Morrison and W. J. Morrison, and which said pretended claim, estate and interest is without any right whatsoever, and the defendants Finley Morrison and W. J. Morrison have not and neither of them have any estate, right, title or interest in or to any part of the said lands last above described.

X.

The Sligh Furniture Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, claims an estate and interest in the Northwest Quarter of the Northwest Quarter (NW¼NW¼) and the South Half of the Northeast Quarter (S½NE¼), and the Southeast Quarter (SE¼), all of Section Sixteen (16), Township Three (3) South, Range Six (6) East Willamette Meridian, through and under a deed executed by Finley and W. J. Morrison of date July 12, 1910, which said deed pretended to convey to the said The Sligh Furniture Company, the lands last above described, and which said pretended claim, estate and interest is without any right whatsoever and the defendant, The Sligh Furniture Company, has not any estate, right, title or interest in the said lands or premises or any part or parcel thereof.

XI.

The Act of Congress Approved February 14, 1859, provides in part, that

"Sections 16 and 36 of every township of

public lands in said state (Oregon), and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

XII.

The defendants and each and every one of them derive their claim or right, title, interest and estate in said lands, under and by virtue of the provisions of the Act of Congress hereinbefore recited, directly or by mesne conveyances, from the State of Oregon, and said claims and each and every of them is without any right whatsoever, for the reason that the said lands having been withdrawn from settlement, entry, sale or other disposal except under the mineral laws of the United States, before and prior to the survey of the same as hereinbefore set forth, no right, title, interest or estate in said lands, ever or at all vested in the said State of Oregon.

To the end, therefore, that your plaintiff may have that relief which can only be obtained in a court of equity and in this court having jurisdiction under the aforesaid facts, and that the defendants may answer the premises and show, if they can, why plaintiff should not have the relief herein prayed for, your plaintiff prays and requests of Your Honors to grant your plaintiff a writ of subpoena to be directed to the said defendants, commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and

then and there full, true, direct and perfect answer make (but not under oath, the benefit whereof is hereby expressly waived) to all and singular the premises and to stand, perform and abide by such order, direction and decree as may be made against them or either of them in the premises as to Your Honors shall seem meet and agreeable to equity, and that Your Honors may decree that the title of the plaintiff in and to the said lands and each and every part, portion and parcel thereof, is good and valid; that the defendants and each and every of them have no right, title, interest or estate therein to the said lands or any part, portion or parcel thereof; that the contracts of sale, certificates, deeds and other conveyances and muniments of title, under, through and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands, be cancelled, vacated and held for naught and that the defendants and each of them be forever enjoined and debarred from asserting any claim whatsoever in or to the said lands or any part, portion or parcel thereof, adversely to the plaintiff, and for such relief as to Your Honors shall seem meet and agreeable to equity and for its costs and disbursements.

ROBERT F. MAGUIRE,
Assistant United States Attorney
for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon.—ss.

I, Robert F. Maguire, being first duly sworn, on oath depose and say that I am Assistant United

States Attorney for the District of Oregon, and that the facts set forth in the foregoing bill of complaint are true as I verily believe; that I base this affidavit upon the record in said cause as is furnished and delivered to me by the Department of Agriculture and by authority and under the direction of the Attorney General of the United States.

ROBERT F. MAGUIRE,
Assistant United States Attorney
for the District of Oregon.

Subscribed and sworn to before me this 23d day of November, 1911.

F. L. BUCK,
(L. S.) Notary Public for Oregon.

[Endorsed]: Bill of Complaint. Filed November 24, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 5 day of January, 1913, there was duly filed in said Court, an Amended Answer, in words and figures as follows, to wit:

[Amended Answer.]

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

The joint and several amended answer of W. J. Morrison, Finley Morrison and the Sligh Furniture Company, a corporation, to the bill of complaint of the above named plaintiff respectfully shows as follows:

I.

Answering paragraph I of said bill of complaint these defendants deny that the lands therein described are or were at any of the times mentioned in the bill of complaint a part of the public domain of the United States.

II.

Answering paragraph II of said bill of complaint these defendants admit that on the 16th day of December, 1905, the Secretary of the Interior by proclamation temporarily withdrew from entry, settlement, sale or other disposal, except under the mining laws of the United States, all of the lands described in paragraph I of the bill of complaint, together with other lands belonging to the plaintiff, for forest purposes; but allege that such withdrawal was subject to the rights acquired by these defendants in the lands claimed by them as hereinafter set forth, and also was by the terms of the proclamation or order withdrawn by description according to the subdivisions of the survey hereinafter mentioned.

III.

Answering paragraph III of the bill of complaint these defendants admit that on the 25th day of January, 1907, the President of the United States by executive proclamation established the Cascade Range

Forest Reserve in Oregon and included therein the lands described in said bill of complaint; but allege that in so far as the lands claimed by these defendants is concerned, which lands are hereinafter particularly described, the same was subject to the rights acquired by these defendants from the State of Oregon as hereinafter set forth.

IV.

Answering paragraph IV of said bill of complaint these defendants admit that on January 2, 1902, a field survey of the lands described in the bill of complaint, including the lands claimed by these defendants as hereinafter described, was made and that said survey was accepted by the Commissioner of the General Land Office on January 31, 1906; but deny that prior to said last mentioned date the said lands, or any part thereof, were unsurveyed lands, or were public lands belonging to the United States, or a part of the public domain, and allege that the said lands had been acquired by these defendants from the State of Oregon as hereinafter described.

V.

Answering paragraph V of the bill of complaint these defendants deny that the United States holds the title to the lands described in the complaint, including the lands claimed by these defendants as hereinafter described, and allege that the title to said lands last mentioned is now in the defendant the Sligh Furniture Company, which title was derived as hereinafter set forth.

VI.

Answering paragraph VI of the bill of complaint as to the claim of the defendant E. J. Cowlishaw to the Southwest Quarter of Section Sixteen these defendants have no knowledge or information thereof sufficient to form a belief, and these defendants disclaim any interest in said Southwest Quarter of Section Sixteen in Township Three South of Range Six East of Willamette Meridian.

VII.

Answering paragraph VII of said bill of complaint these defendants admit that the defendants Finley Morrison and W. J. Morrison acquired an estate and interest in the Southeast Quarter of Section Sixteen, Township Three South of Range Six East of Willamette meridian under color of title from Robert E. Loudon, which interest was subsequently conveyed to the Sligh Furniture Company as is hereinafter more particularly set forth, and these defendants deny that the said claim is without any right, and deny that they have not a good title thereto.

VIII.

Answering paragraph VIII of said bill of complaint these defendants admit that the defendants Finley Morrison and W. J. Morrison claim an estate and interest in the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian under color of title acquired through Alvira S. Loudan, as is hereinafter more particularly set forth, and deny that the

claim and estate is without any right and deny that said defendants Finley Morrison and W. J. Morrison have not good title thereto.

IX.

Answering paragraph IX of said bill of complaint these defendants and each of them do not claim and never have claimed to have any right, interest or estate in the south half of the Northwest Quarter or in the Northeast Quarter of the Northwest Quarter of Section Sixteen in Township Three south of Range Six East of Willamette meridian embraced in said paragraph IX of the bill of complaint, and they disclaim any interest therein.

X.

Answering paragraph X of said bill of complaint these defendants admit that the Sligh Furniture Company, the defendant corporation above named, is organized under the laws of the State of Michigan and admit that it claims an interest and estate in the Northwest Quarter of the Northwest Quarter and the South half of the Northeast Quarter and the entire Southeast Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian, which estate is derived through the said Finley Morrison and W. J. Morrison from the State of Oregon as hereinafter more particularly set forth, and deny that said estate and interest is without any right, and deny that the said Sligh Furniture Company has not any title to said lands or any part thereof.

XI.

Answering paragraph XI of said bill of complaint these defendants admit that the Act of Congress approved February 14, 1859, provided as set forth in paragraph XI.

XII.

Answering paragraph XII of said bill of complaint these defendants admit that as to all of the lands particularly described above, except those to which they disclaim any title, they derived their claim of title directly or by mesne conveyances from the State of Oregon, and deny that said claims or any of them are without right, and deny that said lands have been withdrawn from settlement, entry, sale, or other disposal except under the mineral laws of the United States before or prior to the survey of the same, but allege that said withdrawal was subject to the title of the State of Oregon theretofore acquired as hereinafter set forth.

XIII.

Further answering said bill of complaint these defendants allege and show to the court that the said Section Sixteen in Township Three South of Range Six East of Willamette meridian was granted to the State of Oregon by the United States by the terms of the Act of Congress approved February 14, 1859, for the use of schools, which grant was duly accepted by the State of Oregon by act of the legislative assembly of the State of Oregon approved June 3, 1859.

XIV.

That on January 2, 1902, a field survey of said Ses-

tion Sixteen was made under the direction of the Surveyor General of the State of Oregon in conformity with the laws of the United States, which survey was duly approved by said Surveyor General of the State of Oregon on the 2d day of June, 1903, and plats thereof were duly filed as provided by law. That the plat of said survey as approved by the Surveyor General was accepted by the Commissioner of the General Land Office on the 31st day of January, 1906, without any correction or change of any kind and in exactly the same form as approved by said Surveyor General.

XV.

That on the 16th day of December, 1905, by an order of the Secretary of the Interior the vacant and unappropriated land in said Section Sixteen was temporarily withdrawn from all disposal except under the mining laws. That on December 19, 1905, a telegram was sent by the Commissioner of the General Land Office to the Register and Receiver at Portland, Oregon, informing them of said withdrawal and stating that the land had been withdrawn for forestry purposes, and on December 19, 1905, a letter was sent by the Commissioner to the Register and Receiver giving them the same information. That the said withdrawal so made by said Secretary and Commissioner described said lands by government subdivision according to the rectangular system of government survey, and were based on said survey approved by the Surveyor General of Oregon as aforesaid.

XVI.

On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include certain additional lands, which included the said Section Sixteen, but excepting from the force and effect of said proclamation all lands which at said date were embraced in any withdrawal or reservation for any use or purpose to which said reservation for forest uses is inconsistent. That the said withdrawal and proclamation was inconsistent with the use of the said lands for school land by the State of Oregon and inconsistent with the grant of said lands to the State of Oregon for said uses theretofore made as above set forth, and was inconsistent with the reservation of said lands for said uses as embraced in and covered by said grant. That the said proclamation and withdrawal by the Department are the proclamation and withdrawal mentioned in the bill of complaint.

XVII.

That by virtue of the said grant of Section Sixteen to the State of Oregon and by virtue of the said survey of said lands in the field and the approval thereof by the Surveyor General and the filing and approval thereof as hereinbefore set forth, the title to said lands vested in the State of Oregon beyond the power of the Department or of the President or of Congress to interfere with or deprive the state of the same, and the State of Oregon acquired the full right of disposal of said lands thereby.

XVIII.

That on the 10th day of October, 1906, the State of Oregon, in pursuance of the law of said state for the disposal of said lands, executed and delivered a certificate of sale to the Southeast Quarter of said Section Sixteen to Robert F. Louden, and executed and delivered a certificate of sale of the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen to Alvira S. Louden; and the said Robert F. Louden and Alvira S. Louden thereafter duly assigned and transferred said certificate of sale to the defendants Finley Morrison and W. J. Morrison, and on the 9th day of January, 1907, the said Finley Morrison and W. J. Morrison duly surrendered said certificates to the State of Oregon in conformity with law, and the State of Oregon on said last mentioned date by its proper officers duly executed and delivered to said Finley Morrison and W. J. Morrison a deed of conveyance whereby it granted to them the Southeast Quarter and the South half of the Northeast Quarter and the Northwest Quarter of the Northwest Quarter of said Section Sixteen in Township Three south of Range Six East of Willamette meridian, subject to right of way for ditches, canals and reservoir sites for irrigation purposes constructed, or which may be constructed, by authority of the United States; and said defendants Finley Morrison and W. J. Morrison thereby acquired a fee simple title to said real estate and became the owners thereof. That the said deed was duly recorded in the office of the Recorder of

Deeds for Clackamas County, Oregon, which is the county in which said lands are situated, on the 26th day of January, 1907, and was also recorded in Book 32 of State Deed Records at Salem, Oregon, on page 420.

XIX.

That thereafter, to-wit: on the 12th day of July, 1910, the said Finley Morrison and W. J. Morrison and their wives by deed duly granted and conveyed the said last described lands to the Sligh Furniture Company, a corporation, which deed was recorded in the Recorder's office for Clackamas County, Oregon, on the 3d day of August, 1910, and said Sligh Furniture Company thereby became the owner of said lands in fee simple, and is now the owner thereof.

WHEREFORE these defendants pray that this suit may be dismissed and that they have and recover their costs and disbursements herein.

R. SLEIGHT,
Attorney for defendants Finley Morrison, W. J. Morrison and Sligh Furniture Company.

[Endorsed]: Amended Answer of Defendants W. J. Morrison, Finley Morrison and Sligh Furniture Co. Filed Jan. 5, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of January, 1912, there was duly filed in said Court, a Replication, in words and figures as follows, to wit:

[Replication.]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and THE SLIGH FURNITURE COMPANY, a corporation,
Defendants.

Replication of the plaintiff in the above entitled cause to the answer of the defendants W. J. Morrison, Finley Morrison, and the Sligh Furniture Company.

Comes now the United States of America, plaintiff in the above cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that this bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient.

WHEREFORE he prays relief as set forth in his original bill.

ROBERT F. MAGUIRE,
Solicitor.

[Endorsed]: Replication. Filed Jan. 20, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 13 day of January, 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

No. 3866.

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON and THE SLIGH FURNITURE COMPANY (a Corporation),

Defendants.

John McCourt, United States Attorney,
Robert F. Maguire, Assistant United States Attorney.
R. Sleight for Defendants.

Wolverton, District Judge:

This is a suit to quiet the title to certain lands in the plaintiff against the claim of ownership and right to possession of the defendants. The lands are a part of School Section No. 16, in Township 3 South, Range 6 East of the Willamette Meridian. The facts as stipulated by counsel are as follows:

Prior to May 27, 1902, the lands were unsurveyed lands of the United States. On that date a field survey of the east boundary of said lands was made, and on June 2nd the north, west and south boundaries were surveyed, and section 16 subdivided according to the rules of the Land Office in surveying the lands of the Government. This field survey was approved by the United States Surveyor General of the State of Oregon June 2, 1903, and on June 8th that officer

transmitted copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C., and the survey was accepted by the Commissioner January 31, 1906. On November 16, 1907, the Commissioner directed the Surveyor General to place a plat of the survey in the field in the local land office of the United States at Portland, Oregon, which was on the same date accordingly filed in that office. On December 16, 1905, the Secretary of the Interior, by order, temporarily withdrew for forestry purposes, from all forms of disposition whatsoever except under the mineral laws of the United States, all vacant and unappropriated public lands within a certain specifically described area including said Township 3 South, Range 6 East, W. M., and the local land office was duly notified of such order. On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include such lands, which, among other things, provided that all lands which at said date were embraced within any withdrawal or reservation for any use or purpose to which said reservation for forest uses was inconsistent were excepted from the force and effect of such proclamation.

On October 10, 1906, the State of Oregon, in pursuance of the laws for the disposal of lands owned by it, executed a certificate of sale to Robert F. Louden for the Southeast quarter of said section 16, and to Alvina S. Louden a certificate for the South half of the Northeast quarter and the Northwest quarter of the Northwest quarter of said section; and they there-

after assigned and transferred said certificates of sale to Finley and W. J. Morrison. On January 9, 1907, the State of Oregon, on surrender of the certificates of sale, executed to these latter purchasers a deed granting and conveying to them the lands described. On July 12, 1910, Finley and W. J. Morrison conveyed to the defendant Sligh Furniture Company.

Under the facts as thus stipulated, it is claimed by the Government that at the time the State exercised authority to sell and dispose of such lands, they were not school lands, but were the property of the Government, and not subject to sale by the State. The defendants controvert this position, and claim to have acquired the fee simple title in regular course. The question thus presented depends upon the proper construction of the clause in the Enabling Act of Congress for the admission of the State of Oregon into the Union, approved February 14, 1859, pertaining to school lands, which reads as follows:

"That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

The grant was accepted by the Legislative Assembly of the State June 3, 1859. The language of the act is "Shall be granted." This has never been construed, that I am aware of, as a grant in praesenti, but it rather looks to the future, as depending on some future act or event, and as not to become effective

until such act or event has taken place or happened. It is manifest that the act is not a grant of all sections 16 and 36 within the territorial limits of the State, for it provides that if such sections, or any part thereof, have been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted. This again raises the inquiry as to when the grant is to become effective as an actual transfer of the lands to the State. As to the lands to be granted in the place of the school sections, or any part thereof, sold or otherwise disposed of, it is very plain that there could be no passing of title until they were identified by some approved method of selection from the public domain. In construing a similar statute—the Enabling Act of the State of Nevada, which employed the words "shall be and are hereby granted"—the Supreme Court was led to observe that:

"Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted."

Heydenfeldt v. Daney Gold, etc. Co., 93 U. S. 634, 638.

In that case the State of Nevada issued a patent to

plaintiff's predecessor July 14, 1868. The defendant claimed under a patent from the United States issued March 2, 1874, under the Act of Congress of July 26, 1866, as amended by an act approved July 9, 1870, and the act of May 10, 1872, relating to the development of the mining resources of the United States. The land in controversy was mineral land, and the defendant's grantors and predecessors had entered upon the same for mining purposes in 1867, prior to the survey or approval of the survey of the school section in which it was located, and had claimed the same in conformity with the laws and customs of miners in that locality. The Enabling Act for the admission of the State into the Union was adopted March 21, 1864. So it appears that in case that the land in dispute was entered upon for mining purposes subsequent to the adoption of the Enabling Act, at a time prior to a survey of the school section, but before the grant by the State to plaintiff's predecessor, and the question was fairly presented whether the title passed to the State at the time of its admission into the Union, or at some future time, namely, the time of its identification in place by a proper survey. And it was held that "Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality."

In an earlier case it was said, the court speaking

with reference to the Enabling Act of the State of Michigan, almost identical in language with that of Oregon:

"We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The jus ad rem by the performance of that executive act becomes a jus in re, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

Cooper v. Roberts, 18 How. 173, 179.

In a later case, Minnesota v. Hitchcock, 185 U. S. 373, the court treated of the significance of the words "public lands," and quoted as authoritative the language of the court in Hewhall v. Sanger, 92 U. S. 761, 763, as follows:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

It then, after citing other authorities bearing upon the subject, proceeded to say:

"Again, the language of the section" (referring to the Minnesota Enabling Act, identical with that of Oregon as to the grant of school lands) "does not

imply a grant in praesenti. It is 'shall be granted.' Doubtless under that promise whenever lands became public lands they came within the scope of the grant."

Later the court further commented:

"But while this is true it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which give it equivalent sections."

This was followed further in the opinion by a citation of the Heydenfeldt case, indicating its holding, namely, "that the United States had full power to dispose of the land until after a survey and the identification thereby." Then, after referring to a joint resolution adopted by Congress on March 3, 1857, prompted by a memorial from the Territory of Minnesota, the court concluded that:

"The act of admission with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof."

It would seem to be a logical deduction from these authorities, therefore, that the grant of the school sections does not vest the title thereof in the State until they have become identified through a survey determining their location. In further support of this view see also Hibberd v. Slack, 84 Fed. 571, and State of Oregon, L. D., decided July 5, 1912.

As to the case of Beecher v. Wetherby, 95, U. S. 517, there may be found expressions in the opinion seemingly opposed to this view, but the case itself does not appear to have been so considered by the Supreme Court in the Hitchcock case, although commented upon at some length. Furthermore the case was decided subsequent to the Heydenfeldt case, with but a year intervening, and, although cited in the briefs of counsel, it was not referred to in the opinion of the court, so that we cannot infer that it was the intention to overrule that case.

The next question presented is whether a survey in the field is sufficient to meet the requirements of an identification of school sections by survey. That the Land Department has authority to make rules and regulations, subject to law, in all matters pertaining

to the disposition of public lands, will not be questioned. And it is said that, "From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior." Citing Rev. Stat. Sec. 453.

Cragin v. Powell, 128 U. S. 691, 697.

See also Knight v. U. S. Land Association, 142 U. S. 161, 177.

In the exercise of this power the Land Department, on April 17, 1879, issued instructions to the Surveyors General that they should not file the duplicate plats in the local land offices until the duplicates had been examined in the General Land Office and approved, and the Surveyors General officially notified of that fact. Since such regulation it has been held by the Secretary of the Interior, and it has become the practice of the Land Department, that public lands are not to be deemed surveyed or identified until approval of the plat of survey and filing thereof by direction of the Commissioner of the General Land Office in the local land office. F. A. Hyde & Co., 37 L. D. 164, 165.

This ruling has been specifically reaffirmed in a later case. Anderson v. State of Minnesota, 37 L. D. 390, 392. See also State of Oregon, L. D. 259, supra.

The Land Department having adopted such a rule under clear authority of law, and having so interpreted it, and it having the stamp of reason and sound policy, there is little left for the courts to do but to apply it.

In the case at bar the stipulation shows that, measured by this rule, there was no survey or proper identification of School Section No. 16, Township 3 South, 6 East, at the time the land was incorporated into the Cascade Reserve through withdrawal by the Commissioner, followed later by the proclamation of the President. Nor do I think that the lands in dispute were excepted from the operation of the proclamation.

The plaintiff is entitled to the relief as prayed, and it is so ordered.

[Endorsed]: Opinion. Filed Jan. 13, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of March, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

No. 3866.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

This cause came on to be heard and was argued by counsel appearing for the Plaintiff and the defendants, W. J. Morrison, Finley Morrison, and the Sligh Furniture Company, a corporation, a statement of facts having been agreed upon by the parties plaintiff and defendant, by their respective counsel, and filed herein;

And it appearing to the Court that a subpoena in the above entitled cause was duly issued and served on E. J. Cowlishaw, defendant herein, and that no appearance has been entered by the said E. J. Cowlishaw, and that an order taking the bill as confessed was duly entered in the order book on the 6th day of February, 1913, in the office of the Clerk of the Court, and no proceeding has been taken by the said defendant, E. J. Cowlishaw, since the entry of said order, and more than thirty days have elapsed since entering the order pro confesso against the said E. J. Cowlishaw;

WHEREUPON, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to the relief as prayed in its bill of complaint, viz:

That plaintiff's title to the Southwest Quarter (SW¼), and the Northwest Quarter (NW¼), and the South Half (S½) of the Northeast Quarter (NE¼), and the Southeast Quarter (SE¼), of Section Sixteen (16), Township Three (3) South, Range Six (6), East of the Willamette Meridian, in the State of Oregon, and to every part and parcel thereof, is

In the case at bar the stipulation shows that, measured by this rule, there was no survey or proper identification of School Section No. 16, Township 3 South, 6 East, at the time the land was incorporated into the Cascade Reserve through withdrawal by the Commissioner, followed later by the proclamation of the President. Nor do I think that the lands in dispute were excepted from the operation of the proclamation.

The plaintiff is entitled to the relief as prayed, and it is so ordered.

[Endorsed]: Opinion. Filed Jan. 13, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of March, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

No. 3866.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

This cause came on to be heard and was argued by counsel appearing for the Plaintiff and the defendants, W. J. Morrison, Finley Morrison, and the Sligh Furniture Company, a corporation, a statement of facts having been agreed upon by the parties plaintiff and defendant, by their respective counsel, and filed herein;

And it appearing to the Court that a subpoena in the above entitled cause was duly issued and served on E. J. Cowlishaw, defendant herein, and that no appearance has been entered by the said E. J. Cowlishaw, and that an order taking the bill as confessed was duly entered in the order book on the 6th day of February, 1913, in the office of the Clerk of the Court, and no proceeding has been taken by the said defendant, E. J. Cowlishaw, since the entry of said order, and more than thirty days have elapsed since entering the order pro confesso against the said E. J. Cowlishaw;

WHEREUPON, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to the relief as prayed in its bill of complaint, viz:

That plaintiff's title to the Southwest Quarter (SW¼), and the Northwest Quarter (NW¼), and the South Half (S½) of the Northeast Quarter (NE¼), and the Southeast Quarter (SE¼), of Section Sixteen (16), Township Three (3) South, Range Six (6), East of the Willamette Meridian, in the State of Oregon, and to every part and parcel thereof, is

good and valid; that the defendants, E. J. Cowlishaw, W. J. Morrison, Finley Morrison, and The Sligh Furniture Company, a corporation, and each and every of them, have no right, title, interest or estate therein to the said lands or any part, portion or parcel thereof; that the contracts of sale, certificates, deeds and other conveyances and muniments of title, under, through and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands, be cancelled, vacated and held for naught, and that the defendants and each of them be forever enjoined and debarred from asserting any claim whatsoever, in or to said lands, or any part, portion or parcel thereof, adversely to the plaintiff; and,

IT IS FURTHER ORDERED AND ADJUDGED that the complainant herein recover its costs and disbursements in this suit, of and from the defendants, taxed at $78.68.

Done and dated at Portland, Oregon, this 15 day of March, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Decree. Filed March 17, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of April, 1912, there was duly filed in said Court, a Stipulation of Facts, in words and figures as follows, to wit:

[Stipulation of Facts.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON and the SLIGH FURNITURE COMPANY, a corporation,

Defendants.

IT IS HEREBY STIPULATED by and between the above named plaintiff and the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company, that the following Statements of Facts is hereby admitted to be true for the purposes of all trials of this action, and of any and all appeals or other proceedings herein, no proof need be offered or produced by either of said parties upon such trial or appeal as to any of said facts, but the Court shall be at liberty to draw the same inference therefrom which might be drawn from the same facts if they were established by evidence.

IT IS FURTHER STIPULATED that either of said parties shall have the right to object to the competency, relevancy or materiality of any of the facts herein stipulated or any part thereof. And either of said parties shall also have the right to introduce and offer testimony or proof in addition to the facts herein stipulated, and not inconsistent with this stipulation.

I.

That the above named defendants, W. J. Morrison and Finley Morrison are citizens and residents of the State of Oregon, and The Sligh Furniture Company is a corporation organized and existing under the laws of the state of Michigan, and a citizen and resident of Michigan.

II.

The Act of Congress approved February 14, 1859, provides in part that:

> "Sections 16 and 36 of every township of public lands in said state (Oregon), and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

Said Act and grant was accepted by the State of Oregon by the Act of the Legislative Assembly of that State, Approved June 3, 1859.

III.

Prior to the 27th day of May, 1902, no survey of any kind had been made by the United States of the lands which are the subject of this suit. On the 27th of said lands was made under the direction of the United States Surveyor General of the State of Oregon, and on the 2d day of June, 1902, a field survey under the direction of the same official was made of the north, west and south boundaries, and the subdivisions of said lands, and according to the terms of the said field survey, the lands

which are the subject of this suit were and are described as Section sixteen (16) in township three (3) south, range six (6) east of the Willamette Meridian; that said field survey was approved by the United States Surveyor General for the State of Oregon on the 2d day of June, 1903, and that on the 8th day of June, 1903, the said Surveyor General transmitted copies of the plat of survey and field notes to the Commissioner of the General Land Office, Washington, D. C.; the said survey was accepted by the Commissioner of the General Land Office on the 31st day of January, 1906. On November 16, 1907, the Commissioner of the General Land Office directed the said Surveyor General to place a plat of the said survey in the field, in the local land office of the United States at Portland, Oregon; that said survey was accepted by the Commissioner of the General Land Office on January 31, 1906, and was filed in the local land office of the United States at Portland, Oregon, on the 16th day of November, 1907, in substantially the same form in which the same was accepted by the said Surveyor General, without change or correction thereof.

IV.

That on the 16th day of December, 1905, the Secretary of the Interior by an order of that date, temporarily withdrew for forestry purposes from all forms of disposition whatsoever except under the mineral laws of the United States all the vacant and unappropriated public lands within the areas specifically described in that certain letter of the Com-

missioner of the General Land Office, of date December 12, 1905, to the Secretary of the Interior, including all of Township three (3) south, range six (6) east of the Willamette Meridian. In December, 1905, a telegram was sent by the Commissioner of the General Land Office to the Register and Receiver of the United States Land Office at Portland, Oregon, informing him of said withdrawal and stating that the land had been withdrawn for forestry purposes and on December 19, 1905, a letter was sent by the said commissioner to the Register and Receiver, giving him the same information, copies of which said letters, orders and telegrams are hereby attached, hereby made a part hereof and marked Exhibit "A"; that the said withdrawal so made by the Secretary of the Interior and the Commissioner of the General Land Office described said lands according to the rectangular system of government survey.

V.

On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include said lands in addition to those theretofore embraced in said reserve, which enlargement included the said section sixteen (16); that by said proclamation, it was provided that all lands which at said date were embraced in any withdrawal or reservation for any use or purpose to which said reservation for forest uses was inconsistent were excepted from the force and effect of said proclamation. That the said proclamation and withdrawal is the proclamation and withdrawal mentioned

in the Bill of Complaint and the amended answer of the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company, a copy of which said proclamation is hereto attached and hereby made a part hereof, and marked Exhibit "B".

VI.

That on the 10th day of October, 1906, in pursuance of the laws of Oregon providing for the disposal of lands owned by said state, the State of Oregon executed and delivered a certificate of sale of the southeast quarter of said section sixteen (16) to Robert F. Louden, and executed and delivered a similar certificate of sale of the south half of the northeast quarter and the northwest quarter of the northwest quarter of said section sixteen (16) to Alvina S. Louden, and the said Robert F. Louden and Alvina S. Louden thereafter duly assigned and transferred said certificates of sale to the defendants, Finley and W. J. Morrison and on the 9th day of January, 1907, the said Finley Morrison and W. J. Morrison surrendered said certificates to the State of Oregon in conformity with law, and the State of Oregon on said last mentioned date, by its proper officers, executed and delivered to the said Finley Morrison and W. J. Morrison a deed of conveyance whereby it granted and conveyed to them the southeast quarter and the south half of the northeast quarter and the northwest quarter of the northwest quarter, of said section sixteen (16) in township three (3) south, range six (6) east, Willamette Meridian, in the State of Oregon, subject to right of way for ditches, canals and reservoir sites

for irrigation purposes, constructed or which might be constructed by authority of the United States; that said deed was recorded in the office of the Recorder of Deeds for Clackamas County, Oregon, which is the county where said lands are situated, on the 26th day of January, 1907, and was also recorded in book 32 of State Deed records at Salem, Oregon, on page 420.

VII.

That on the 12th day of July, 1910, the said Finley Morrison and W. J. Morrison with their wives, executed and delivered a warranty deed of said premises conveying the same to the Sligh Furniture Company, a corporation, which deed was recorded in the Recorder's office of Clackamas County, Oregon, on the 3d day of August, 1910.

ROBERT F. MAGUIRE,
Assistant United States Atty.
and Atty. for Plaintiff.
R. SLEIGHT,
Atty. for dfts. W. J. and Finley
Morrison & Sligh Furniture Co.

[Endorsed]: Stipulation of Facts. Filed Apr. 30, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Government's Exhibit C.]

"B" Forest Service
M. F. N. 4-207r District 6.
RECEIVED
May 6, 1912.
Referred to Law Officer

DEPARTMENT OF THE INTERIOR
General Land Office
Washington

April 29, 1912.

I hereby certify that the annexed copy of letter dated February 28, 1906, is a true and literal exemplification from the press-copy of letter in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed by name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(seal) H. A. Campel,
Recorder of the General Land Office.

Filed Jun. 25, 1912.
A. M. Cannon,
Clerk U. S. District Court.

1905

158648 W.L.K.
"R" J.M.P.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.,
February 29, 1906.

Address Only
The Commissioner of the
General Land Office.
The Honorable
The Secretary of the Interior.
Sir:

On January 31, 1905, Adolf Aschoff, Forest Super-

visor, northern division of the Cascade Range Forest Reserve, Oregon, reporting to this office relative to the status of the E½ of Sec. 36, Tp. 9 S., R. 5 E., W. M., after examination, states that said land is now owned by the Curtis Lumber Company, by purchase from one Tom Edison; that the improvements found thereon consist of a one-room hemlock log cabin with one door, one window, shake roof and puncheon floor; that said land is estimated to contain 16 million feet of timber, board measure, 5 thousand feet having been cut in 1893 for building purposes.

This land was included in the Cascade Range Forest reserve by proclamation dated September 28, 1893, which excluded on and after that date, except under the mineral laws, from settlement, entry, sale or other manner of disposal, all vacant unappropriated public lands included and described in said proclamation.

The records of this office show that the plat of the township survey was approved by the Surveyor General of Oregon, January 13, 1894, and was filed in the local office October 23, 1894.

In view of the statements made by the forest supervisor, and the facts disclosed by the records here, pertaining to the land above described, this office on September 25, 1905, addressed a communication to the State Land Agent at Salem, Oregon, calling his attention thereto, and that, as the plat of survey of the township was not filed until more than a year after the date of the proclamation withdrawing and including the land in said forest reserve, following the long settled ruling of the Department, it must be

held that no right to said land accrued to the State by virtue of the grant made by Congress for the benefit of common schools, and requested him to furnish this office with such information as he might be able to supply relative to the assertion and exercise by the State, at any time, of any right and title to this land, and if any such claim had ever been made, by what authority it was done.

In reply thereto, the State Land Agent, Mr. Oswald West, on October 5, 1905, in a letter to this office stated that the E½ of Sec. 36 was sold by the State to R. Edson, under a contract of sale dated May 17, 1895, and deed given thereto, dated September 1, 1900; that the W½ of same section was sold and deeded to Valentine Pawley May 4, 1895, and that from letters and papers on file in his office these people, obviously referring to Edson and Pawley, settled on the land prior to its survey, but why they purchased the land from the State instead of filing homestead entries he is unable to state.

He further represents that "the S½ of Sec. 16, same township and range, was sold under contract to Ira C. Traver and the N½ of the same section to C. R. Bruntsche, (likely dummies), August 15, 1898, and these certificates, or contracts, were soon afterward assigned to A. S. Baldwin, of the Benson and Hyde crowd, who received a deed to the land June 28, 1899."

He states that he is unable to inform this office why the State Land Board sold these lands, as it appears that the Clerk was cognizant of the fact that

they were unsurveyed at the time they were included in the forest reserve, and that title did not pass to the State.

I have the honor, therefore, to recommend, in view of the foregoing facts, and as it clearly appears the title to these lands has never passed out of the United States, that the Forestry Service of the Department of Agriculture be properly advised thereof, and requested to promptly assume and exercise such authority and supervision over said lands, as will best conserve the government's interests therein and protect the timber thereon and any other valuable property from waste and wanton destruction.

I enclose herewith copy of the correspondence referred to herein, together with the papers comprising the subject matter thereof.

Very respectfully,

W. A. Richards, Commissioner.

M.L.H.

[Defendant's Exhibit 1.]

E
DBM
102660-1903
38377-1904

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C. Oct. 13, 1904

Subject: Omissions in returns of surveys.

The U. S. Surveyor General,
Portland, Oregon.

Sir:

Your letter dated June 8, 1903 together with the returns of surveys of township No. 3 south, range No. 6 east of the Willamette Meridian, Oregon, have been received.

These returns covering the resurvey of the exterior of the exterior boundaries, and the survey of the subdivisional lines of said township as executed by Frank X. Gesner, D. S., under his joint contract with Alonzo Gesner No. 740, dated February 12, 1902 have been under consideration in this office during which it has been observed that the deputy has failed to comply with the requirements of the Manual of surveying instructions, at the beginning of his work of resurvey of the exterior boundaries, by omitting to either describe the kind of instrument used in the execution of the work, or to record any Polaris or Solar observations at this time.

It appears the work was probably commenced April 17, 1902 but no polaris observation is recorded during the resurvey of the exterior lines, between this date and the commencement of the town—subdivision May 7, and only one solar observation May 3, is recorded during this part of the work.

A solar observation is reported at the commencement of the subdivision May 7, being the only one during this work, ending June 16, revealing a failure to comply with that section of the Manual which requires that on every survey executed with solar instruments, the deputy will, at least once on each work-

ing day, record in his field notes the proper reading of the latitude arc; the declination of the sun corrected for refraction, set off on the declination arc; and note the correct local mean time of his observations etc.

You are directed to notify the deputies that before any further action will be taken in this office looking to the acceptance of the surveys, they will be required to file a supplemental report showing a compliance with the Manual in the matters herein cited.

Very respectfully,
Signed W. A. Richards,
Commissioner.

L. O. F.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon, Sept. 8th, 1905.

Hon. Commissioner General Land Office,
Washington, D. C.

Sir:

I have the honor to transmit, this day, under separate cover, for your examination, two books of additional field notes of resurvey of exteriors and subdivisions of Tp. 3 S., R. 6 E., W. M. Oregon, executed by Frank X. Gesner, U. S. Deputy Surveyor, under joint contract No. 740, dated February 12, 1902, including details of the establishment of meridian by Polaris and solar observations and taking the latitude daily. These additional notes were furnished by the deputy in compliance with instructions con-

tained in your letter "E", dated October 13th, 1904.

Very respectfully,

Signed John D. Daly,

U. S. Surveyor General for Oregon.

"E"

DBM CLDB

102660-1903

19475-1904

144073-1904

143766-1905

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

Washington, D. C. Jan. 31, 1906.

U. S. Surveyor General,

Portland, Oregon.

Sir:

Your letter dated September 8, 1905, transmitting two books of additional field notes of the resurvey of exterior and subdivisional lines of Tp. 3 S., R. 6 E., W. M. Oregon, as executed by Frank X. Gesner, D. S., under joint contract No. 740 Oregon, dated February 12, 1902, has been received.

The two books of additional field notes have also been received and an inspection thereof, together with a comparison with the returns previously filed in this office, completes the record of surveys as called for in office letter "E", dated October 13, 1904.

The completed returns have been compared with the report of Examiner of Surveys, N. B. Sweitzer, who examined the work in the field, and while he

does not recommend the acceptance of the surveys, he states that the work is in fairly good condition.

Considering the surface conditions, and that the errors found were few, and not very great, this office has reached the conclusion to accept the survey. The surveys are therefore hereby accepted, and you are authorized to file the triplicate plats in the local land office.

No entries of any lands will be allowed however, in this township until further permission is given, reference being had to the reports of A. R. Greene, Special Inspector of the Interior Department, dated January 16, 1904, and A. W. Barber, Detailed Clerk, dated July 27, 1904, reporting that the alleged settlement of applicant for the survey were illegal, and the direction of the Hon. Secretary of the Interior, dated August 10, 1904, based on such reports, that no entries be allowed, but that the survey be accepted for payment only.

very respectfully,

Signed S. A. Richards,

JCP Commissioner.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL,

Portland, Oregon, Feb. 6th., 1906

Register & Receiver,
U. S. Land Office,
Portland, Oregon.

Gentlemen:—

I am this day in receipt of the Hon. Commissioner's

Letter "E" dated Jan. 31, 1906, in which he accepts the survey of Alonzo & Frank X. Gesner of T. 3 S., R. 6 E., W. M., and directs the filing of the triplicate plat in the local land office. The triplicate plat is this day forwarded to you under separate cover. Please acknowledge receipt.

The Commissioner in his letter states: "No entries of any lands will be allowed however, in this township until further permission is given, reference being had to the reports of A. R. Greene, Special Inspector of the Interior Department, dated January 16, 1904, and A. W. Barber, Detailed Clerk, dated July 27, 1904, reporting that the alleged settlement of applicants for the survey were illegal, and the direction of the Hon. Secretary of the Interior, dated August 10, 1904, based on such reports, that no entries be allowed, but that the survey be accepted for payment only."

Respectfully,

Signed Jno. D. Daly,
U. S. Surveyor General for Oregon.

E
TCH
191517-1907.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Washington, D. C., Nov. 16, 1907.

Filing Plat

The U. S. Surveyor General
Portland, Oregon.

Sir:

Referring to office letter "E" dated January 31, 1906, advising you of the acceptance of the survey of T. 3 S., R. 6 E., W. M. Oregon, by Alonzo & F. X. Gesner, D. S., under contract No. 740, and directing that the plat be filed in the local land office, but that no entries be allowed in the township until further notice, reference being had to the reports of A. R. Greene Special Inspector, and A. W. Barber, Detailed Clerk, I have to advise you that I am now in receipt of a report from S. N. Stoner, Special Agent, Dated October 30, 1907, in which he reports:

"I made a field investigation, October 28 & 29, 1907, of the bona fides of the applicants for the survey and the present settlers in T. 3 S. R. 6 E., W. M. xxxx."

It was found that the four applicants for the survey, namely, J. W. Elliott, Marion F. Dolph, Chester V. Dolph and E. E. Hazard, did actually enter on the land and build cabins thereon, but that no residence on the land was maintained by either of them.

In the matter of present settlers, it was found that there are now ten actual bona fide settlers, residing on the land, and who took up their residence on their respective claims before the same was withdrawn from entry.

In addition to the work done by the settlers on their respective claims, they have constructed a fairly good wagon road to their settlement, at considerable labor and expense.

The land is heavily timbered and is well adapted to

agriculture and fruit when timber is removed.

In view of the fact that the above settlers are acting in good faith in the matter of residence and improvement, it is respectfully recommended that the survey be accepted to the end that the settlers may file upon their respective claims."

In view of this recommendation you are directed to advise the Register and Receiver that the suspension of this township from entry, as contained in said letter "E" dated January 31, 1906, is hereby revoked and that they will now place said plat on file in accordance with the instructions of circular of October 21, 1885 (4 L. D., 202).

Very respectfully,

Signed Fred Dennett,
Commissioner.

L. J.

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon, Nov. 23rd, 1907.

Hons. Register & Receiver,
United States Land Office,
Portland, Oregon.

Sirs:—

With my letter of February 6th, 1906, by direction of the Hon. Commissioner of the General Land Office, I forwarded to you triplicate plat of Tp. 3 S., R. 6 E., the same having been accepted for payment by the Hon. Commissioner's letter "E", dated January 31st., 1906. You were directed in this letter, in accordance

with instructions contained in the Commissioner's letter of acceptance, that no entries of any land will be allowed until further permission is given.

I am now in receipt of the Hon. Commissioner's letter "E", dated November 16th., 1907, in which in accordance with a recommendation made to him by Mr. S. N. Stoner, Special Agent, I am directed to advise you that the suspension of this township from entry as contained in said letter "E" dated January 31st, 1906, is hereby revoked, and that you will place said plat on file in accordance with the instructions of circular of October 21, 1885, (IV L. D. 202).

Please acknowledge receipt of this.

Respectfully,

Signed GEO. A. Westgate,

U. S. Surveyor General for Oregon.

4-699

DEPARTMENT OF THE INTERIOR
OFFICE OF U. S. SURVEYOR GENERAL

Portland, Oregon

June 4, 1912.

I, Geo. A. Westgate, U. S. Surveyor-General for Oregon, do hereby certify that the annexed copies of official letters are true and literal exemplifications of the originals thereof on file in my office.

Geo. A. WESTGATE,
United States Surveyor-General
for Oregon. (seal)

Filed June 25, 1912.

A. M. Cannon, Clerk U. S. District Court.

[Defendants' Exhibit 2.]

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Portland, Oregon, June 6th, 1912.

I, H. F. Higby, Register of the United States Land Office, Portland, Oregon, hereby certify that the records of this office show that on the plat of Government survey of Township 3 South, Range 6 East, Willamette Meridian, is a marginal notation in ink as follows: "Received in the United States Land Office at Portland, Oregon, February 7, 1906", same is signed "Algernon S. Dresser, Register."

It is further shown by letter report of the Register and Receiver of this office, to the Commissioner of the General Land Office, under date of May 5, 1909, in reference to the above stated township plat of survey, that, "By (General Land Office letter) "C" " of November 30, 1907,—we were directed that the plat should be officially opened and in accordance therewith advertisement was made and the required instructions in re opening of township plats were complied with, and January 8, 1908, at 9 o'clock A. M., named as the date when actual settlers would be accorded the privilege of presenting their claims."

H. F. HIGBY,
Register.

Filed June 25, 1912.
A. M. Cannon,
Clerk U. S. District Court.

[Defendants' Exhibit 3.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR-GENERAL.

Portland, Oregon, June 20, 1912.

Mr. R. Sleight,
1410 Yeon Bldg.,
Portland, Oregon.

Sir:—

I am this day in receipt of your letter of June 20th, 1912, in which you wish to be informed if the following lines of the following townships have been surveyed on or before January 25th., 1907, namely:

The South township line of frac. T. 1 N., R. 7 E. The North township line of T. 1 S., R. 7 E. The section lines between Secs. 6 & 7, 5 & 8, 8 & 9, 16 & 17, 19 & 20, 28 & 29 and 28 & 33, in T. 1 N., R. 8 E., and the township line between Sec. 1, T. 1 N., R. 7 E., and Sec. 6, T. 1 N., R. 8 E., and the North line of Tp. 3 S., R. 8 E., and also of the subdivisions of said township 3 S., R. 8 E., and all of the township and subdivisional lines of T. 3 S., R. 9 E.

In reply, I have to state that the Base Line between Tps. 1 N., and 1 S., R. 7 E., was surveyed in 1858. The S. boundary of T. 3 S., R. 9 E. was surveyed in 1882. The East boundary of T. 3 S., R. 9 E. and the North boundary of Secs. 1, 2, 3, and the west boundary of Secs. 18, 19, 30 and 31 T. 3 S., R. 9 E., were surveyed in 1884.

The East boundary of Secs. 13, 24, 25 and 36, T. 3 S., R. 8 E. were surveyed in 1884.

The balance of the lines mentioned in your letter are unsurveyed.

Respectfully,
GEO. A. WESTGATE,
U. S. Surveyor General for Oregon.

Filed June 25, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Defendants' Exhibit 4.]

Address reply to
"District Forester"

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE

DISTRICT 6

OG
District-Atlas

Beck Building
Portland, Oregon.
June 20, 1912.

Mr. R. Sleight,
c|o Coovert & Sleight, Yeon Bldg.
Portland, Oregon.

Dear Sir:

I desire to inform you, in accordance with the request of Mr. A. C. Shaw, that, in the understanding of this office, the broken lines on proclamation diagrams, of which the enclosed diagram dated January 25, 1907, is one, are intended to indicate that the townships were unsurveyed at that date. The township and section lines indicated by solid lines are similarly

intended to indicate that those areas were surveyed at the time.

Very truly yours,
GEO. H. CECIL,
District Forester.

(Enclosure)

Filed June 25, 1912.
A. M. Cannon, clerk
U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

To the Hon. Chas. E. Wolverton, District Judge; and the judge before whom said cause was tried:

The above named defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, conceiving themselves aggrieved by the de-

cree entered herein March 15, 1913, by which it was decreed that plaintiff was entitled to the relief as prayed in its Bill of Complaint and that the plaintiff's title to the lands described in said decree and to every part and parcel thereof is good and valid, and that these defendants and each of them have no right, title or interest therein, and that the contracts of sale, certificates, deeds and other conveyances under which these defendants claim any estate, right, title or interest in said lands be vacated, cancelled and held for naught, and that these defendants and each of them be forever enjoined from asserting any claim to said lands do hereby appeal to the United States Circuit Court for the Ninth Circuit from said decree and from the whole and every part thereof for the reasons set forth in the Assignment of Errors which is herewith filed by these defendants, and these defendants pray that this their petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And that pending the determination of said appeal said decree be suspended upon these defendants and appellants giving a bond in such sum as shall be fixed by the court, and that the amount of said bond to be given upon appeal be fixed by the court.

Dated June 19, 1913.

R. SLEIGHT,
Solicitor for dfts. Finley and
W. J. Morrison and Sligh Furniture Co.

[Endorsed]: Petition for Appeal. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON and the SLIGH FURNITURE COMPANY, a corporation,

Defendants.

On reading and filing the petition of Finley Morrison, W. J. Morrison and the Sligh Furniture Company, a corporation, for an order allowing an appeal from the decree entered herein March 15, 1913, and upon the assignment of errors made and filed by said defendants, and on motion of R. Sleight of counsel for said defendants:

IT IS ORDERED that the appeal of Finley Morrison, W. J. Morrison and the Sligh Furniture Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit from said de-

cree which was entered herein on March 15, 1913, be and the same is hereby allowed and that a transcript of the record be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit. Dated June 19th, 1913.

BY THE COURT
CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Order Allowing Appeal. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON, and the SLIGH FURNITURE CIMPANY, a corporation,
Defendants.

The above named defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, assign the following errors upon the decree herein which was entered March 15, 1913:

ASSIGNMENT OF ERRORS.

I.

In decreeing that the plaintiff is entitled to the relief as prayed in its bill of complaint.

II.

In decreeing that the plaintiff's title to the southwest quarter and the northwest quarter and the south half of the northeast quarter and the southeast quarter of section sixteen (16) township three (3) south range six (6) east, W. M. State of Oregon, and to every part and parcel thereof, is good and valid.

III.

In decreeing that defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation, and each and every of them have no right, title, interest or estate in the said lands or any part thereof, and that the contracts of sale, certificates, deeds and other conveyances under and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands be cancelled, vacated and held for naught and that the said named defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said lands or any part thereof adversely to the plaintiff.

IV.

In decreeing that the plaintiff recover costs and disbursements in this suit from said defendants.

V.

In failing to decree that the suit could not be main-

tained and should be dismissed.

R. SLEIGHT,
Solicitor for dfts. Finley Morrison, W. J. Morrison and Sligh Furniture Co.

[Endorsed]: Assignments of Error. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

KNOW ALL MEN BY THESE PRESENTS that we, Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation as principals and Chas. H. Chick of Portland, Oregon as surety are held and firmly bound unto the United States of America, plaintiff herein, in the full and just sum of Five Hundred Dollars to be paid to the plaintiff afore-

said, for which payment well and truly to be made we bind ourselves our successors, heirs, executors, administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of June, 1913.

WHEREAS the United States District Court for the District of Oregon in the cause above entitled pending in said court did make and enter a decree on the 15th day of March, 1913, in favor of the plaintiff and against these defendants, adjudging the plaintiff entitled to the relief prayed in its bill of complaint and that these defendants and each of them be barred of all right, title or interest in and to the lands described in the complaint and be enjoined from asserting any claim thereto, and these defendants having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the aforesaid suit, and a citation directed to the said plaintiff is about to be issued citing and admonishing it to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, and an order having been made and entered that these defendants should give a bond upon said appeal in the sum of $500.00 with surety to be approved by the judge or clerk of this court:

NOW THE CONDITION is such that if the said defendants Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation shall prosecute their said appeal to effect and shall answer all

damages and costs that may be awarded against them if they fail to make their plea good then this obligation is to be void; otherwise to remain in full force and virtue.

FINLEY MORRISON,
W. J. MORRISON,
THE SLIGH FURNITURE COMPANY,
By R. SLEIGHT, Atty.
CHAS. H. CHICK.

The sufficiency of the foregoing bond and surety is hereby approved this 19th day of June, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Bond. Filed June 19, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1913, There was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. J. COWLISHAW, W. J. MORRISON, FINLEY MORRISON and the SLIGH FURNITURE COMPANY, a corporation,
Defendants.

To the United States of America, and the United States Attorney for the District of Oregon:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, California, thirty days from and after the day this citation bears date pursuant to an order allowing the appeal of the defendants, W. J. Morrison, Finley Morrison and the Sligh Furniture Company a corporation, filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Finley Morrison, W. J. Morrison and the Sligh Furniture Company a corporation are appellants and you are appellee, to show cause if any there be why the decree entered in said suit in favor of the above named plaintiff and against the above named defendants Finley Morrison W. J. Morrison and the Sligh Furniture Company a corporation should not be reversed and why such further proceedings should not be had therein as will be agreeable to equity.

WITNESS the Hon. Chas. E. Wolverton, Judge of the District Court of the United States for the District of Oregon this 19th day of June, 1913.

CHAS. E. WOLVERTON,
Judge.

Due service of the foregoing citation admitted this June 19, 1913.

E. A. JOHNSON,
Atty. for Ptff. & Asst. Dist. Atty. for the District of Oregon.

[Endorsed]: Citation. Filed June 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of June, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Certifying Up Exhibits.]

In the District Court of the United States for the District of Oregon.

No. 3866

June 26, 1913

THE UNITED STATES OF AMERICA,
Complainant,

vs.

FINLEY MORRISON, et al,
Defendants.

It appearing to the court that Complainant's exhibits A and B introduced in evidence on the trial of this cause in this court are of such character as to require inspection by the appellate court;

It is ordered that said exhibits be certified up with the record to the United States Circuit Court of Appeals, Ninth Circuit, on the appeal thereof.

CHARLES E. WOLVERTON,
Judge.

[Endorsed]: Order. Filed June 26, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of June, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Enlarging Time to File Transcript.]

In the District Court of the United States for the District of Oregon.

No. 3866

June 26, 1913

THE UNITED STATES OF AMERICA,
Complainant,

vs.

FINLEY MORRISON, et al.,
Defendants.

Now, at this day, for good cause shown, it is ordered that the defendants' time for filing the record and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, on the appeal thereof, be, and the same is hereby, enlarged and extended to and including the 1st day of August, 1913.

CHAS. E. WOLVERTON,
Judge.

INDEX

IN THE

United States Circuit Court of America

NINTH DISTRICT

W. J. MORRISON,
FINLEY MORRISON and
SLIGH FURNITURE COMPANY,
a corporation,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

STATEMENT.

The lands in question in this suit constitute a part of section 16, in township 3 south, range 6 east, in the state of Oregon. The sole question involved upon this appeal is whether after survey of the lands in the field but

before the survey was approved by the department and the plat of a survey filed in the local land office, the state had such a title to the lands, under the grant of sections 16 and 36 contained in the Enabling Act admitting the state into the Union, as to enable the state to convey such lands to purchasers.

The act admitting Oregon to the Union, approved February 14, 1859, is in part as follows:

> "Sections 16 and 36 of every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for school purposes."

This grant was accepted by the legislature of Oregon by Act of June 3, 1859.

Section 16 involved in this suit was surveyed in the field January 2, 1902. Such field survey was approved by the United States Surveyor General for the State of Oregon on June 2, 1903, and on June 8, 1903, the Surveyor General transmitted copies of the plat and field notes to the General Land Office, and such survey was accepted by the Commissioner of the General Land Office on January 31, 1906, the delay in acceptance being owing to the fact that the deputy surveyor did not use a solar compass, and also to the fact that the settlement of certain settlers on these lands was then under investigation by the Department. On December 16, 1905, the Secretary of the Interior by proclamation temporarily withdrew this land and other lands adjoining, for forestry purposes, and on January 25, 1907, the

President by proclamation established the Cascade Range Forest Reserve, including said section 16 and other lands adjoining.

On October 10, 1906, the State of Oregon executed and delivered certificates of sale of the lands involved in this suit, which certificates were subsequently assigned and under such assignment deeds were executed and delivered by the State on the 9th day of January, 1907, to the appellants, Finley Morrison and W. J. Morrison, covering the lands in controversy, and thereafter the appellants Morrisons conveyed said lands to the appellant Sligh Furniture Company.

This suit was brought by the United States to set aside said conveyances and to declare the United States to be the owner of said lands and to quiet title thereto. The appellants Morrisons and Sligh Furniture Company answered, setting up their title acquired from the State of Oregon and denying the title of the plaintiff. The case was tried upon a stipulation of facts and letters and exhibits thereto attached, showing the foregoing facts.

The plaintiff seeks to recover upon the theory that the withdrawal of section 16 for forestry purposes having been made before the approval of the survey by the General Land Office, although after a survey had been made in the field, no title passed to the appellants under the deed issued by the state, but that the title remained in the United States.

The Court rendered a decree in favor of the plaintiff from which this appeal is brought.

ASSIGNMENT OF ERRORS.

I.

In decreeing that the plaintiff is entitled to the relief as prayed in its bill of complaint.

II.

In decreeing that the plaintiff's title to the southwest quarter and the northwest quarter and the south half of the northeast quarter and the southeast quarter of section 16, township 3 south, range 6 east, W. M., State of Oregon, and to every part and parcel thereof, is good and valid.

III.

In decreeing that defendants, Finley Morrison, W. J. Morrison and the Sligh Furniture Company, a corporation, and each and every of them have no right, title, interest or estate in the said lands or any part thereof, and that the contracts of sale, certificates, deeds and other conveyances under and by virtue of which the said defendants and each of them claim any estate, right, title or interest in said lands be cancelled, vacated and held for naught and that the said named defendants and each of them be forever enjoined and barred from asserting any claim whatever in or to said lands or any part thereof adversely to the plaintiff.

IV.

In decreeing that the plaintiff recover costs and disbursements in this suit from said defendants.

V.

In failing to decree that the suit could not be maintained and should be dismissed.

ARGUMENT.

The grant of Section 16 to the state irrevocably pledged this land to the state, and placed it beyond the power of Congress or the President to divert it to other purposes.

In *Beecher v. Weatherby*, 95 *U. S.* 517, it was held that under a grant of section 16 to Wisconsin for school purposes, couched in the same terms as the grant to Oregon, the title became vested in the state, and the land could not be appropriated to any other purpose. The court said (page 523):

> "It was therefore an unalterable condition of the admission, obligatory upon the United States, that section 16 in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the state. *They were withdrawn from any other disposition, and set apart from the public domain,* so that *no subsequent law* authorizing a sale of it could be construed to embrace them, and all that could be legally done under the compact was to identify the

sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. *They could not be diverted from their appropriation to the state.* * * * * * In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the state, upon the authority cited (Cooper v. Roberts, 18 How. 173) became complete, unless there had been a sale or other disposition of the property by the United States *previous to the compact with the state.* No *subsequent* sale or other disposition, as already stated, could defeat the appropriation."

The decision in the case above cited followed former decisions of the same court in other cases, where similar grants to Michigan and Missouri had been made of section 16 for school purposes.

Cooper v. Roberts, 18 How. 173.

Ham v. Missouri, 18 How. 126.

In *Schneider v. Hutchinson* 35 *Ore.* 253, the same conclusion was reached, the court, by Mr. Justice Bean, using the following language with reference to the right to divert to other purposes the lands granted for the use of schools, (page 258):

"Again it is contended that the land in question was granted to the state by the general gov-

ernment for the use of schools as upon a condition subsequent, and that upon its application to other purposes the United States has the right to re-enter and take possession, and against this right the statute of limitations does not run, and therefore no person can acquire title to such lands by adverse possession prior to its alienation by the state. The vice of this position lies in the fact that the grant to the state is not upon a condition subsequent, but it is an absolute grant, vesting the title in the state for a special purpose. The language of the act of Congress is that such land 'shall be granted to the state for the use of schools,' and the *United States has no right to re-enter for any reason whatever.*"

From these authorities it is clear that if the land which, upon a survey being made is found to be embraced in Section 16, constituted a part of the public domain at the time of the grant, it was by the grant set apart from the public lands and given irrevocably to the state for the use of schools, so that the government could not afterwards divert it to any other purpose, or do anything whatever with respect to it except to survey it.

II.

Has the rule announced in Beecher v. Wetherby and Cooper v. Roberts been departed from or overruled in Minnesota v. Hitchcock or any other cases?

No doubt the plaintiff will contend that the government has the right to dispose of any of the lands in sec-

tions 16 and 36 at any time before the survey has been approved by the department, and will rely upon Minnesota v. Hitchcock, 185 U. S. 373, and Heydenfeldt v. Daney Gold M. Co., 93 U. S. 634, in support of that contention, for the plaintiff cannot prevail in this suit upon any other theory. It therefore becomes important to examine those cases and see whether there is any irreconcilable conflict between them and the outhorities above cited. Upon such examination the court will find that instead of being in conflict with the cases cited by us they are in entire harmony with them, and that they still further confirm the opinion that under the circumstances of this case the plaintiff cannot prevail in this suit.

The main feature of the Hitchcock case lies in the fact that the lands in question there were Indian lands in which the Indians' right of occupancy had never been extinguished except by treaty, in which it was expressly provided that the lands should be sold for the express benefit of the Indians, the money derived from the sales to be paid to them at stated intervals through a long period of years. The court held that under the treaty which ceded the lands upon these terms the lands were Indian lands *and not a part of the public domain*, and when they were ceded upon these express terms they became thereby impressed with a trust in favor of the Indians, and therefore never became a part of the general public domain upon which the school grant could operate. This is not only in accord with the doctrine laid down in Beecher v. Weatherby, but necesasrily followed from the rule there established, that the school grant

could only operate upon lands constituting a part of the public domain. In Minnesota v. Hitchcock, at page 393, the court said:

> "But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes, and *if these lands have never become public lands* the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—*that is, within a tract which is not strictly public lands*—certain lands should be set aside for a public park, or as a reservation for military purposes, *or for any other public uses*, it has the power notwithstanding the provisions of the school grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, *and thereupon the lands would have become public lands and within the scope of the school grant.*"

It will be seen that the distinction which we are pointing out between the cases of Beecher v. Wetherby and Cooper v. Roberts on the one hand and Minnesota v. Hitchcock and similar cases on the other, is not a fanciful one created by ourselves, but is one which was carefully kept in mind by the court throughout all these decisions, and is necessary to be observed in order to rec-

oncile decisions which would otherwise appear to be out of harmony with each other. That the court did not consider the doctrine laid down in Beecher v. Wetherby at all weakened by the conclusion reached in Minnesota v. Hitchcock is clearly evident from the fact that it distinguished the former case upon the ground that in the Beecher case the lands embracing the school sections had been entirely freed from the Indians' claims, and had thus become public domain upon which the school grant could operate, while in the Hitchcock case the lands had, by treaty with the Indians prior to the admission of Minnesota as a state, been impressed with a trust by which they were to be sold for the benefit of the Indians, the proceeds of the sales to be paid to them for a long period of years, and that on account of their devotion to this purpose the lands *were not a part of the public domain* and hence that the school grant was not operative therein. There is no incompatibility between these decisions, nor was the former overruled by the latter, but on the contrary it was carefully distinguished from it upon the grounds stated. (185 U. S. 394-399). We therefore find the court, in the Hitchcock case, carefully guarding against possible misapprehension of its position by using the qualifying phrase "and if these lands have never become public lands." (Page 394). This was in order to confine the conclusion reached to the facts of that particular case, in which the lands had never become public lands because the Indian right of occupancy had never been extinguished except by the treaty, which provided that the lands should be impressed with a trust whereby they should be sold exclusively for the benefit of the In-

dians, a purpose altogether inconsistent with their being devoted to the use of schools by the State. And it should be observed that this Indian right accrued before the grant to the state. In fact, the Indian right had always existed; the treaty simply recognized this previously existing right, and contained provisions by which the United States agreed to secure it by money payments to the Indians, to be derived from the sale of lands which belonged to the Indians, not to the public domain. This land therefore never was a part of the public domain, hence no school land could be "set apart from the public domain" out of it. The court could not well have reached a different conclusion in the Hitchcock case without declaring a direct breach of faith on the part of the government under the treaty with the Indians, and the decision emphasizes this point and lays stress upon the fact that a liberal interpretation was placed upon the treaty in that case because it was one made with a simple minded people who would not have understood the language used in any other than its ordinary sense.

Nor is Heydenfeldt v. Daney Gold M. Co., 93 U. S. 634, in conflict with Beecher v. Wetherby, 95 U. S. 517, or with the distinction above pointed out, and it is clear that the court did not so consider it, for the former case was cited by counsel in the latter, but was not considered by the court to be of sufficient bearing to be referred to in the opinion, although the Beecher decision was rendered only a year later than the Heydenfeldt decision.

Consequently we confidently assert that the rule of Beecher v. Wetherby remains in full force and applies directly to the circumstances of this case, while the doc-

trine of Minnesota v. Hitchcock has no bearing here at all. In the former case it was distinctly held that when the lands, which upon a subsequent survey might be found to be embraced in section 16, constituted a part of the public domain at the time of the grant they were by such grant "withdrawn from any other disposition and set apart from the public domain" and that "no subsequent law" could divest the title of the state; that "they could not be diverted from their appropriation to the state"; and that the title of the state became complete unless there had been a sale or other disposition of the property by the United States "previous to the compact with the state"; and that "no subsequent sale or other disposition, as already stated, could defeat the appropriation." If this language means what it says (and it has never been qualified or overruled) then there is no escape from the proposition that the attempt to reclaim to the government the lands in question here, under the guise of an appropriation for forestry purposes, is altogether illegal and unwarranted.

According to our view the question in dispute is not so much the question of whether the grant under consideration was in *presenti* or in *futuro*, but rather it is what was the intention of Congress when it granted these school lands to the State, and what was the intention of Congress when it authorized the President to create Forest Reservations, and what was the intention of the President when he created the reservation in question here?

From the authorities cited above it is clear that the Supreme Court does not place a strict construction on the formal terms of the grant in order to determine

whether or not it is in *presenti* or in *futuro*. For example in the Heydenfelt case, a grant which was in terms in *presenti* was held to be in *futuro*, while in the Beecher case, a grant which was in terms in *futuro* was held to be, in fact, in *presenti*. In all the cases the court has determined the question of intent from all the surrounding circumstances, as well as from the language of the grant itself, and has clearly settled a definite policy of the construction of these grants, and determined that grants of school lands to the state, worded like the Oregon grant, are considered to be an *irrevocable pledge* of these lands to the state for the purpose named. In no case has the court ever held that Congress could afterwards give this land away to any person. The only cases which seem to declare such a result are those which are decided upon broad grounds of public policy, like the Hitchcock case, where the court held that the lands were not embraced in the grant because they in reality belonged to the Indians, and that the Indians had a prior right to the lands existing before the grant to the state, and that their right had never been extinguished. In the Heydenfelt case, the court reached the conclusion that the lands were not embraced in the grant because it was clear that they were not intended to be so included, and that to hold otherwise would result in destroying the principal industry of the State of Nevada.

No case can be cited where the Government has attempted to take away school lands for its own purposes. The only instances where the school grant is held to be superseded by a superior right are where settlers have settled on the lands before survey, or where the lands

have never become public domain, as in the Hitchcock case. The Act of February 21, 1891, was passed primarily for the purpose of preserving the right of settlers who had settled before any surveys were made and who could not tell until after the survey on what definite subdivisions or sections their settlement was made. Presumably in the interests of settlements and development of the public domain the act of February, 1891, was passed, and the court has placed a liberal construction upon it, especially in view of the fact that the state has a right under the Act to select other lands in lieu of the lands settled on.

But it should be remembered that the attempt in this case to take these lands away from the state is made after the state had in fact deeded them as state lands, and after they had gone into the hands of an innocent purchaser for value, and after the lands had been surveyed in the field, and that this attempt is made by subordinate officials in the Forestry Department of the Government. But the Supreme Court of the United States takes a broader view of such questions, and under the circumstances here it would seem that the court would adhere to the doctrine laid down in the Beecher case, that when these lands were granted to the State of Oregon they were irrevocably set apart from the public domain for school purposes, and that it was beyond the power of Congress to authorize their being utilized afterwards for forest reservation purposes, and that under the wording of this proclamation the president never intended to set aside any school lands as constituting a part of this reservation.

As stated above, the Government will in no way be prejudiced by failure to recover these lands, because the case of Hibbard vs. Slack below cited conclusively shows that although lands may be embraced within the outer limits of reservations they do not necessarily constitute a part of it, and the court will observe that the township in question, in which the lands involved in this case are situated, is the outside township of this reservation, and section 16 is almost on the outside of the limits of the reservation.

There are many other sections like this similarly situated, not only in this state, but in other states, and if the court should hold that these lands did not belong to the state, not only the appellants in this case, but many other innocent purchasers must suffer by this construction.

III.

As we have seen above, the appellants claim that the state's title became perfect at the time of the grant, the government having nothing further to do than to identify the land by a subsequent survey. When such survey is made the title relates back to the time of the grant.

Does the title pass to the state only upon a survey being made; and if so does this mean a survey in the field or only when the survey is finally approved?

As to when the survey is considered sufficiently complete to operate as a segregation of the land from the public domain so as to cut off the rights of all persons

except the state, is made plain by legislative enactment and judicial construction.

Section 2275 Revised Statutes as amended by the Act of February 25, 1891, providing for the selection by the state of other lands in lieu of those situated in school sections which have been settled upon, provides that if the settlement was made "before the survey of the lands in the field" the lands shall be subject to the claims of settlers. It further provides that other lands of equal acreage are also appropriated where the school lands "are mineral land, or are included within any Indian, military, or other reservation." Is there any plausible reason why, under this statute, it should be claimed that the time of the survey in the field should be held to be the criterion applying to settlers while a different time is applied to withdrawals for Indian or forestry reservations or other purposes? We think no such construction can be placed upon the statute. If then the criterion fixed by this statute is to be in force the plaintiff's case here must fail, for the survey of this section in the field was complete several years before any attempt to withdraw the lands in suit.

In *Hibbard v. Slack*, 84 *Fed.* 571, in an exhaustive and elaborate discussion of the effect of the Act of 1891 (R. S. Sec. 2275) the court held that a state could not select indemnity lands in lieu of school lands which, after they had been surveyed in the field and the title thereby become fixed in the state, were included within the exterior boundaries of a forest reservation; also that the title to school lands became so vested in the state by a survey in the field that they were not thereafter sub-

ject to the disposal of Congress, and although included within the exterior limits of a forest reservation did not form a part of the reservation. In deciding this case the court applied the criterion of time fixed by the statute with respect to settlers, viz. "before the survey in the field" to the provisions relating to the disposal of the land for reservations or other purpose, and this is doubtless the correct construction. The court said (p. 574):

> "In construing the Act of February 28, 1891, there are certain well established principles of law applicable to school sections, which should constantly be borne in mind, as follows: First, Title to school section, if unencumbered at date of survey, then vests absolutely in the state." (Citing cases). "And this is the principle recognized and acted upon by the Department of the Interior." (Citing cases.) "After title has thus vested the section is not subject to any further legislation by congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations." (Citing cases.) "Second, *Until the surveys in the field* of the school sections, to-wit 16 and 36, the United States has full power of disposal over them."

The decisions of the Dapartment, referred to in the foregoing petition, were followed by the Supreme Court of California, which held that the title to school lands became vested in the state when the survey was made in the field.

Oakley v. Stuart, 52 Calif. 521, 535.

But even if the court should deem that the survey contemplated by law, as requisite to pass the title, was incomplete until approved by the Surveyor General, as was held in the later case of Medley v. Robertson, 55 Cal. 396, it would not change the result in this case, for the survey of this section 16 was so approved June 2, 1903, while no attempt at a withdrawal was made until December 16, 1905, when the Secretary's order was made, and the actual proclamation of withdrawal was not issued until January 25, 1907.

IV.

Another objection to plaintiff's contention consists in the fact that the survey was finally accepted by the department January 31, 1906, and plat filed in the District Land Office February 7, 1906, nearly a year before the actual proclamation of withdrawal; and the same was accepted as originally made, without any change whatever. So that, under the doctrine of relation, which has long been recognized by the courts as applying in questions of title, when so accepted it related back to its inception, and the title of the state vested under it as of the date of its completion in the field.

And again, when the withdrawal was made it was a withdrawal according to the said survey; that is, a plat was attached to the proclamation showing this section to be surveyed and withdrawing the lands according to the descriptions on the plat. While we do not claim the government would be estopped by the acts of its officers, we nevertheless think this is of significance as showing

the construction of the department that this section was then surveyed land, following the uniform ruling that it was surveyed when the survey had been made in the field and approved by the Surveyor General.

V.

But regardless of the question of when the survey shall be deemed to be made so as to vest title in the state, it would seem that there was no actual withdrawal of this section 16 by the proclamation of January 25, 1907, for by the terms of the proclamation these lands were in effect excepted from its operation. The language of the exception is as follows:

> "and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent."

This exception clearly recognizes the rule announced in Hibberd v. Slack, *supra*, that although lands may be embraced within the exterior limits of a reservation they are not necessarily thereby a part of it; and that the uses or purposes to which some of the lands so embraced may have been devoted or pledged may be inconsistent with their use for forestry purpose. This exception would seem to apply with as much or more force to school lands than to any other when it is considered that the Supreme Court has so often and emphatically held that the grant to the state pledged the lands for that purpose, and set them apart from the public domain that they might be devoted to that use, and especially when it is

remembered that the court has pursued a liberal policy with reference to these lands to maintain the good faith of the government towards the state. So that we believe it was the expressed intention of the government to except school sections from the operation of the withdrawal.

VI.

But there is a final insuperable objection to the maintenance of this suit by the plaintiff, irrespective of all other questions, namely: that the Act of 1891 (Sec. 2275 as amended) expressly gives the state the right of election to select other lands in lieu of those in the school sections which have been embraced within a reservation, or to await the extinguishment of the reservation and the restoration of the lands therein embraced to the public domain and then to take the specific lands in such sections 16 and 36.

Rev. Stats., Sec. 2275 as amended.

United States v. Thomas, 151 U. S. 577, 583.

The state of Oregon never waived its right to the lands in question here by selecting or attempting to select other lands in lieu of them, but on the contrary it conveyed these lands to the appellants' grantors after they were surveyed, showing its intention to claim these specific lands. Consequently even if it be held that these lands were legally set apart and form a part of this reservation, the appellants would nevertheless be entitled to await the extinguishment of the reservation and claim the specific lands in question. It follows therefore that

the plaintiff cannot prevail in a suit seeking to foreclose the appellants of their claim to the lands.

In every case involving the question of the right of a state to school lands under grants similar to this the Supreme Court has pursued a liberal policy of awarding the lands to the state wherever it was possible to do so; and in every instance where it was not done, it was due to some superior equity previously existing in a third person, not in the government, as in the Indians in the Hitchcock case and in the miners in the Heydenfeldt case. Where no such equity existed the right of the state has been considered as accruing at the time of the grant, as in the Cooper and Beecher cases. No such prior equity exists here, and no monetary loss will fall upon anyone by denying the plaintiff's claim, but on the other hand great loss would be entailed upon the appellants here, who purchased from the state in good faith, as well as upon all other persons falling within the same class who have made similar purchases from the state.

It is therefore respectfully submitted that the decree should be reversed and the complaint dismissed.

R. SLEIGHT,
Attorney for Appellant Morrison.

No.

UNITED STATES OF AMERICA.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

W. J. MORRISON, FINLEY MORRISON AND SLIGH FURNITURE COMPANY, a corporation,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR APPELLANT, SLIGH FURNITURE COMPANY.

MARK NORRIS,
Of Counsel for Sligh Furniture Co.

UNITED STATES OF AMERICA.

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Appellee.

Names and Addresses of Attorneys Upon this Appeal:

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INDEX.

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BRIEF FOR APPELLANT, SLIGH FURNITURE COMPANY.

I.

Appellee, complainant below, filed its bill to quiet its asserted title (R. 7, XII) to lands in Section 16, Township 3 South, Range 6 East, Willamette Meridian, Ore-

gon (R. 2, I). Defendant company, appellant here, claims title to the Northwest quarter of the Northwest quarter, the South half of the Northeast quarter, and the Southeast quarter of said section (R. 12, X). It disclaims all interest in all other lands described in the bill (R. 11, VI; R. 12, IX). Defendants and appellants Morrisons are grantors of the appellant company (R. 17, XIX), and except as warrantors to the appellant company appear to have no interest in any of the lands described in the bill (R. 35, 36, VI, VII; R. 11, VI; R. 12, IX).

II.

Complainant and appellee claims title as original proprietor, asserting that said lands have never been granted by it and that the same are now parcel of the Oregon National Forest (R. 2, I). Defendants and appellants claim title to said lands under the school land grant to the state of Oregon and by mesne conveyances from that state (R. 13-17, XIII-XIX). The court below decreed the lands in question to be the property of complainant and appellee and that its title should be quieted (R. 28-30). The court's reasons for so ruling are found in its opinion (R. 19-28). The defendants appeal (R. 52, 53), and assign for error that the court below erred.

First, in decreeing that the plaintiff is entitled to relief;

Second, in decreeing that the plaintiff's title to the lands in which appellants are interested is good and valid;

Third, in decreeing that the defendants and appellants have no title to the lands claimed by them, and that their muniments of title be vacated and they enjoined from asserting any title in the future;

Fourth, in awarding costs to the plaintiff;

Fifth, in not dismissing the bill (R. 56, 57).

III.

The sole question in the case is, has the title to the lands involved, and in which the defendants and appellants are interested, passed from the United States to the state of Oregon?

IV.

The facts are all matters of record and are undisputed. Most of them are stipulated (R. 31-36). Other facts, like Statutes of the United States, its school grant policy, the Statutes of Oregon, etc., are matters of judicial knowledge.

Brown v. Piper, 91 U. S. 37.
Furman v. Nichols, 8 Wall. 44.
Gardner v. Barney, 6 Wall. 499.
Spokane v. Zeigler, 167 U. S. 65.
Hoyt v. Russell, 117 U. S. 401.
Owings v. Hull, 9 Pet. 607.
Lamar v. Micon, 114 U. S. 218.
Caha v. United States, 152 U. S. 211.
Blake v. United States, 103 U. S. 227.

A.

From the ordinance of 1787, which contained these memorable words: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" (1 Bioren & Duane's Laws of the United States, 475), it has been the policy of the United States to grant to each state as it was organized section 16 in each township for the use of the schools. From 1848 the grant has been of sections 16 and 36.

The Public Domain, Donaldson, Government Printing Office, 1884, pp. 223-228.

These grants were made by congressional reserva-

tions to the territories followed by congressional grants to the states as they were organized.

"Statement of the grants to State and reservations to Territories for school purposes.

State and Territories.	Dates of grants.
Section 16.	
Ohio,	March 3, 1803.
Indiana,	April 19, 1816.
Illinois,	April 18, 1818.
Missouri,	March 6, 1820.
Alabama,	March 2, 1819.
Mississippi,	March 3, 1803; May 19, 1852; March 3, 1857.
Louisiana,	April 21, 1806; February 15, 1843.
Michigan,	June 23, 1836.
Arkansas,	Do.
Florida,	March 3, 1845.
Iowa,	Do.
Wisconsin,	August 6, 1846.
Sections 16 and 36.	
California,	Act March 3, 1853.
Minnesota,	February 26, 1857.
Oregon,	February 14, 1859.
Kansas,	January 29, 1861.
Nevada,	March 21, 1864.
Nebraska,	April 19, 1864.
Colorado,	March 3, 1875.
Washington Territory,	March 2, 1853.
New Mexico Territory,	September 9, 1850; July 22, 1854.
Utah Territory,	September 9, 1850.
Dakota Territory,	March 2, 1861.

Montana Territory, ... February 28, 1861.
Arizona Territory, ... May 26, 1864.
Idaho Territory, ... March 3, 1863.
Wyoming Territory, ... July 25, 1868.

Oregon was the first territory for which sections 16 and 36 were reserved (Act of Aug. 14, 1848, 9 Stats. 323), and the third to which those two sections were granted.

California, Act of March 3, 1853, 10 Stats. 244.

Minnesota, Act February 26, 1857, 11 Stats. 166.

Oregon, Act February 14, 1859, 11 Stats. 383.

The first statute dealing with the school lands in Oregon was the act of August 14, 1848, 9 Stats. 323. Section 20 of that act is as follows:

> "That when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same hereby is, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same."

From the adoption of that statute to the present time, so far as the writer can discover, no statute relating to the public domain has failed to recognize the obligation of the United States and the right of the territory or state under that grant.

The act of September 27, 1850, 9 Stats. 496, Oregon Donation Act, Section 9, provides:

> "That no claim to a donation right under the provisions of this act upon sections sixteen or thirty-six shall be valid or allowed if the resi-

dence and cultivation upon which the same is founded shall have commenced after the survey of the same."

The act of February 19, 1851, 9 Stats. 568, Section 1, provides:

"That the governors and legislative assemblies of the territories of Oregon and Minnesota be and they are hereby authorized to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six in said territories, reserved in each township for the support of schools therein."

The act of January 7, 1853, 10 Stats. 150, gave Oregon a lieu right in place of lands on these sections acquired under the donation act.

The enabling act of February 14, 1859, 11 Stat. 383, provides;

"That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection; which, *if accepted, shall be obligatory upon the United States and upon the state of Oregon,* to-wit: *First,* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous as may be, *shall be granted* to said state for the use of schools. * * * Provided, however, that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount

so confirmed shall be deducted from the quantity specified in this act."

The undoubted intention of the Congress that Oregon should have these sections for school purposes, evidenced by these statutes, ought not to be defeated by narrow technicalities.

B.

The facts material to this controversy stated in the order of their dates are as follows:

August 14, 1848, sections sixteen and thirty-six reserved by act of congress "when * * * surveyed under the direction of the government of the United States preparatory to bringing the same into market," 9 Stats. 323.

February 14, 1859, sections sixteen and thirty-six granted the state of Oregon on the state agreeing to certain stipulations.

11 Stats. 383, ante p. .....

June 3, 1859, acceptance by Oregon of the stipulations mentioned in the act of February 14, 1859.

1 Lord's Oregon Laws, pp. 28, 29.

This act, so far as material to this controversy, is as follows:

> "Whereas, the congress of the United States did pass an act, entitled 'An act for the admission of Oregon into the Union,' approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the state of Oregon, in the words following: '§ 4. The following propositions be and the same are hereby offered to the said people of Oregon, for

their free acceptance or rejection, which, *if accepted, shall be obligatory on the United States and upon the said state of Oregon,* to-wit: *First,* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold, or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.

* * * *

Sixth, And that the said state shall never tax the lands or the property of the United States in said state, *provided, however,* that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purpose specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act;' therefore—

§1. Propositions of Congress Accepted.

That the six propositions offered to the people of Oregon in the above recited portion of the act of congress aforesaid be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to-wit:

Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find neces-

> sary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state."

By force of the foregoing legislation we claim the Oregon school land grant vested in the state of Oregon as a float, on June 3, 1859, and that thereafter, the moment the lands were identified by survey, the grant vested as to the specific sections.

April 17, 1879. This date is of importance for the reason that prior to that date the surveys of the United States lands were complete, and the lands surveyed became "public lands" upon the approval of the surveyor general of the state in which the lands lay. Subsequent to this date, by a rule of the land office, the surveyors general were required to transmit the surveys to the land office at Washington and the surveys were not regarded as complete until approved by the general land office there.

Tubbs v. Wilhoit, 138 U. S. 134.

June 2, 1902, Field survey of the lands in question made (R. 32, III).

June 2, 1903, field survey of lands in question approved by the Surveyor General of Oregon (R. 33, III).

June 8, 1903, plat of field survey and survey notes sent to general land office at Washington (R. 33, III).

October 13, 1904, general land office requires from deputy surveyors a supplemental report showing the kind of instrument used in making the survey, and whether polaris and solar observations had been taken during the survey in the field as was required by the manual of surveying instructions (R. 41, 42).

September 8, 1905, supplemental report showing the omitted observations, etc., sent to general land office (R. 42, 43).

November 28, 1905, withdrawal of the lands in question "for a proposed addition to the Cascade and Bull-run Forest Reserve requested by the Secretary of Agriculture" (Complainant's Exhibit A, not printed but returned for inspection; see Record 61).

December 16, 1905, Secretary of the Interior, by letter, temporarily withdraws the "vacant and unappropriated public lands" in the township involved from "all forms of disposition whatever, except under the mineral laws." (Compl. Ex. A.)

December 19, 1905, local land office advised of this withdrawal by telegram and letter. (Compl. Ex. A.)

January 31, 1906, the survey of this township formally accepted and approved by the general land office and its filing in the local land office authorized (R. 43, 44). This approval was of the survey as originally turned in by the surveyor general, and without any modification whatsoever. (R. 44.)

February 6, 1906, the Surveyor General for Oregon authorized the register and receiver of the local land office to file the plat of this survey (R. 44, 45).

February 7, 1906, the plat was received in the local land office at Portland. In his letter of approval, the commissioner of the general land office directed that no *entries* of any lands be allowed until further permission is given, for the reason that there were sundry alleged illegal settlements within the limits of the same.

October 10, 1906, the state of Oregon issued its certificate of sale of the lands claimed by the defendants and appellants.

January 7, 1907, the state of Oregon deeded the lands to the grantor of defendants and appellants.

January 25, 1907, presidential proclamation enlarging the Cascade Range Forest Reserve by including within it the township in question. This proclamation contains the following exception:

> "Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law and the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within *any withdrawal or reservation for* ANY *use or purpose to which this reservation for forest uses is inconsistent;* * * * "

January 26, 1907, Oregon's deed of these lands recorded.

November 16, 1907, the alleged irregular entries in this township having been investigated, the suspension of entries directed by the commissioner's letter of January 31, 1906, was removed by the commissioner of the general land office (R. 46, 47).

November 23, 1907, the Surveyor General of Oregon communicated this letter to the local land office (R. 47, 48).

January 8, 1908, actual settlers authorized to present their claims (R. 49).

July 12, 1910, defendants Morrisons deed to the defendant, the Sligh Furniture Company (R. 17, 36).

June 30, 1911, certain areas, not including the township in question, eliminated from the Oregon National Forest by presidential proclamation (Government's Exhibit B, not printed).

V.

Complainant contends: That the United States having by statute granted to Oregon these school lands may now by executive proclamation, in effect, repeal that congressional grant, not because third parties acquired rights in the lands before they were surveyed but because the forestry department wants the land, i. e., the government is to keep the land for its own benefit. This claim is based on certain propositions.

1. That Oregon had no right to these specific lands prior to the formal approval of the survey by the General Land Office.

2. That before such formal approval the Secretary of the Interior temporarily withdrew "from all forms of disposition whatever except under the mineral laws" the "vacant *unappropriated public land*" in the township in question.

3. That such withdrawal continued in force after the approval of the survey by the General Land Office.

4. That after the survey had been approved, the President by proclamation included these lands in Oregon National Forest.

5. That the temporary withdrawal and presidential proclamation worked to deprive Oregon of these specific lands and forces her to select indemnity lands in lieu thereof.

VI.

Defendants contend:

1. That by Oregon's acceptance of the provisions of the enabling act of February 14, 1859 (11 Stats. 383) on June 3, 1859 (1 Lord's Oregon Laws, 28, 29), Oregon acquired a present vested right to all school sections as a float, subject only to identification by survey, upon which the grant vested in the specific lands in question.

2. That the lands in question were identified so as to vest title to the specific lands in the state when the field survey was made on June 2, 1902; or

3. If not then, upon the approval of the field survey by the Surveyor General of Oregon June 2, 1903.

4. That if the approval of survey by the General Land Office was required, such approval was made, prior to any withdrawal, by the official use by the General Land Office and other departments of this identical survey for the purpose of identifying these identical lands.

5. That immediately upon the formal approval of the field survey by the land office, January 31, 1906, the statutory reservation and grant (contained in 9th Stats. 323, 11th Stats. 383) destroyed the effect of the temporary withdrawal—if such withdrawal ever had any effect—and vested the title to these specific lands in Oregon.

6. That the alleged executive withdrawal of these lands, made December 16, 1905, was of no force because—

(a) If the lands were then public lands; i. e., surveyed, the school grant had vested in the specific lands and the executive department had no authority in the premises.

(b) If the lands were then not public lands; i. e., unsurveyed, there was no executive power to withdraw or reserve them for forest purposes.

(c) That even if the Secretary's withdrawal of December 16, 1905, had force, upon the approval of the survey by the General Land Office January 31, 1906, the congressional reservation and grant took precedence of any executive action.

7. That the presidential proclamation of January 25, 1907, did not affect these lands because (a) at that time the grant was vested in the state of Oregon as to these specific lands, and (b) the proclamation expressly excepts the lands in question from its operation.

VII.

ARGUMENT.

A.

That by acceptance of the provisions of the enabling act Oregon acquired a vested right to all school sections as a float, subject as to the specific lands to identification by survey.

The learned circuit judge devotes a considerable portion of his opinion to a discussion of this question. He quotes a portion of the enabling act, and, in our judgment, not the most significant portion. He also says (R. 24) that the Minnesota enabling act is "identical with that of Oregon as to the grant of school lands." We urge that the learned circuit judge has overlooked the most significant portion of the enabling act (11th Stats. 383, Sec. 4), as follows:

> "That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, *if accepted, shall be obligatory upon the United States and upon the state of Oregon,* to-wit: *First,* that sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted* to said state for the use of schools."

Then follow four other offers to the people of the state of Oregon, all of which are in the same language, "shall be," etc.

Then comes a very significant clause—

> "*Sixth,* And that the said state shall never tax the lands or the property of the United States in said state; *provided, however,* that in case any of the *lands herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

Upon its face the evident intent of this grant is that it shall take effect upon acceptance by Oregon. That being done, the lands are spoken of in the act itself as "*the lands herein granted*" which are words of present grant. These words are found neither in the Minnesota nor Wisconsin school grants, and to that extent the Oregon school grant affords stronger ground for holding it a present grant than either the Minnesota or Wisconsin grants.

The words "*if accepted shall be obligatory upon the United States and upon the said state of Oregon,*" which the learned judge seems not to have considered at all, further enforce the intent claimed.

After acceptance by Oregon no reservation of these lands to the United States for its own use or benefit could be of any force.

Beecher v. Weatherby, 95 U. S. 517.

In *Beecher v. Weatherby* the court said:

> "It matters not whether the words of the compact be considered as merely promissory on the part of the United States and constituting only a pledge of a grant in future, or as operat-

> ing to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the state."

After commenting upon the case of *Cooper v. Roberts,* 18 How. 173, the court, referring to the fact that in the case under discussion the lands had been surveyed, said:

> "With this identification of the sections, the title of the state upon the authority cited became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the state. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

The case of Beecher v. Weatherby was cited with approval in the case of *United States v. Thomas,* 151 U. S. 577, 583. In United States v. Thomas the court said,

referring to the Wisconsin act, considered in Beecher v. Weatherby:

> "This compact whether considered as merely promissory on the part of the United States and constituting only a pledge of a grant in the future, or as operating as a transfer of the title to the state upon her acceptance of the proposition, as soon as the sections could be afterwards identified by the public survey—in either case the lands which might be embraced within those sections were appropriated to the state, subject to any existing claim or right."

See also,

> Cooper v. Roberts, 18 How. 173.
> Ham v. Missouri, 18 How. 126.

It is claimed by counsel for the United States that the doctrine of Beecher v. Weatherby has been in effect overruled by the cases of *Heydenfeldt v. Daney*, 93 U. S. 634, *Minnesota v. Hitchcock*, 185 U. S. 393, 400, and *Wisconsin v. Hitchcock*, 201 U. S. 202. The court will note that Heydenfeldt v. Daney was decided before the case of Beecher v. Weatherby. If therefore there is any necessary conflict between the two cases, Beecher v. Weatherby being subsequent in date must be regarded as having overruled the decision in Heydenfeldt v. Daney. There is, however, no inconsistency between these two decisions, as the court will readily note from an examination of the same. The school land grant in Nevada has held in Heydenfeldt v. Daney not to be a grant *in praesenti*, and it based its decision upon words of qualification in the grant which it considered in the light of conditions existing in and peculiar to the state of Nevada, which conditions, so far as this record shows, do not exist in the state or Oregon.

The case of *Minnesota v. Hitchcock* expressly recognizes, and by quotations reaffirms with approval, the doctrine of Beecher v. Wetherby. All that the case holds is, that the title of the state of Minnesota had never attached to the lands involved, for the reason that such lands had never become public land but had been occupied by Indians and had therefore not passed under the grant contained in the enabling act.

The case of *Wisconsin v. Hitchcock,* 201 U. S. 202, was decided upon the authority of *United States v. Thomas,* 151 U. S. 577, in which the Beecher case was expressly recognized and reaffirmed. There is nothing in the latter case at all in conflict with the case of Beecher v. Weatherby.

Attention is again called to the fact that the act under consideration contains language not found either in the school grants to Wisconsin, Minnesota or Nevada. The language which we have quoted above shows that the act itself speaks of the lands not only as "shall be granted" on acceptance, but presuming such acceptance, speaks of the lands as "herein granted."

As to the grant vesting in the state of Oregon as a float immediately on acceptance, see

St. Paul v. Northern Pacific, 139 U. S. 5.
United States v. Oregon & Calif. R. R., 176 U. S. 28.
Butz v. Northern Pacific, 119 U. S. 55.
Southern Pacific v. United States, 168 U. S. 1.
United States v. Southern Pacific, 146 U. S. 570.
Menotti v. Dillon, 167 U. S. 703.
Missouri, Kansas & Texas v. Cook, 163 U. S. 191.

B.

The lands in question were identified by the field survey so as to vest title in specie in the state.

Facts as to field survey.

June 2, 1902, field survey made.

June 2, 1903, field survey approved *unaltered* by Surveyor General of Oregon.

June 8, 1903, field survey transmitted to General Land Office.

November 28, 1905, field survey *used* by Agricultural Department to identify these specific lands (Complainant's Exhibit A, not printed).

December 12, 1905, field survey *used by the commissioner of the General Land Office to identify these specific lands.*

December 16, 1905, field survey used by Secretary of the Interior to identify these specific lands.

December 19, 1905, field survey used by General Land Office to identify these specific lands.

January 31, 1906, field survey approved by the General Land Office *unaltered.*

The question is one of identification. If the field survey is a good enough identification to identify for purposes of description and withdrawal by the government, it should be of force for the same purpose by the state. Official use of a plat is an approval of the same.

Wright v. Roseberry, 121 U. S. 488, 517.
Tubbs v. Wilhoit, 138 U. S. 134, 144, 145.

In *Wright v. Roseberry* certain plats, furnished by the state of California, were by statute required to be approved by the General Land Office (p. 514). No formal approval of the plats appeared, but it did appear that they had been officially used. This was held to be a sufficient approval, and the court speaks of the plat (p. 517) as "approved by the commissioner as shown by its official use," and they hold that the plat was sufficient and based title upon it.

In the subsequent case of *Tubbs v. Wilhoit,* the court, alluding to the decision in Wright v. Roseberry, said (p. 144):

> "In *Wright v. Roseberry there* was no approval of the township plat in terms, but it was held to be an approved plat by the fact that it was officially used as such."

In the Tubbs case there was a similar plat, to which the commissioner of the general land office was shown to have made reference, and subsequently thereafter the United States issued a patent describing the lands according to the official plat of the survey. Having considered these facts, the court further said (p. 145):

> "It is, therefore, conclusively established that such township plat was recognized by the Land Department at Washington as a correct plat, and used as such, which was the only approval of a similar plat in Wright v. Roseberry."

And on page 146 the court said:

> "Whether the township plat be considered as approved by the action of the surveyor general or by the subsequent recognition of its correctness by the commissioner of the General Land Office, when approved, the duty of the commissioner to certify over to the state the lands represented thereon as swamp and overflowed was purely ministerial. * * * A strange thing it would be if the refusal of an officer of the government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government."

In addition to this official use of this plat, forty-three days later, January 31, 1906, the plat was formally approved by the general land office without alteration or amendment of any kind. By the familiar doctrine of relation, the facts should be held to identify this land as being within the school land grant as of the date of the field survey. The contention of the government that formal approval is necessary under the circumstances shown in this case, amounts to nothing but a pure technicality, which should not be allowed to defeat the evident intent of the congressional grant.

That the field survey is sufficient identification seems to have been the construction placed upon these grants by Congress itself. A survey is merely an act of the political department serving to identify what was before floating and unidentified.

Cooper v. Roberts, 18 How. 173.

By the act of Congress of February 28, 1891, amending Section 2275 of the Revised Statutes (26 Stats. 796), it is provided that in case of a conflict between settlers and the state over school sections, if the settlement was made *before the survey of the lands in the field* the claim of the settler shall have priority, and that on the other hand, if the settlement was made after the survey in the field, the implication necessarily is that the claim of the state has priority. It is not perceived why the rule laid down by Congress for the settlement of disputes between the state and settlers is not equally applicable for the settlement of disputes between the state and itself.

C.

If the field survey was insufficient as an identification, the approval of that survey on June 2, 1903, by the Surveyor General of Oregon was a sufficient identification

and fully complied with the acts of Congress governing this grant.

By the act of August 14, 1848 (9 Stats. 323) these lands, when surveyed, "under the direction of the government of the United States preparatory to bringing the same into market," were reserved for the use of the schools. As we have seen by the act of February 14, 1859 (11 Stats. 383), these lands, subject to identification by survey, were granted to the state of Oregon.

A statute speaks, and its meaning is to be determined as of the date of its adoption. What it meant when adopted it continues to mean until it is amended or repealed. It cannot mean one thing at one time and something else at another.

In Endlich on Interpretation of Statutes (Ed. 1888, Sec. 85) it is said:

> "The language of a statute, as of every other writing, is to be construed in the sense it bore at the period when it was passed."

See also

> Platt v. Union Pac., 99 U. S. 48, 63.
> Smith v. Townsend, 148 U. S. 490, 494.
> M. & O. v. Tennessee, 153 U. S. 486, 502.
> Dewey v. United States, 178 U. S. 510, 520.

In *Platt v. Union Pacific* the Supreme Court said, speaking of the construction of statutes:

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended we must as far as possible place ourselves in the light that congress enjoyed, look at things as they appeared to it,

> and discover its purpose for the language used in connection with the attending circumstances."

At the time of the passing of the act reserving these lands for the use of schools, and also at the time of the passage of the granting act, a survey was complete for all purposes when approved by the Surveyor General of Oregon. It was not until April 17, 1879, (see Tubbs v. Wilhoit, 138 U. S. 134) that by a new regulation of the Land Office the approval of that office was required to complete a survey. It will hardly be contended that a regulation of the Land Office, made for purposes of convenience and possibly to conduce to greater accuracy, could have the effect of changing the meaning of the statutes of Congress enacted twenty and thirty years previously. If this case had arisen in 1875 the court would have held that these lands were sufficiently identified when the Surveyor General of Oregon had approved the plat. The statutes under which the state of Oregon claims have not been altered since 1875. If in 1875 they had one meaning, necessarily they must have the same meaning now. No law of Congress has been, and we believe none can be, cited which authorizes a change in a statute of the United States to be made by a departmental rule.

It appears that the surveys in question were approved by the Surveyor General of Oregon June 2, 1903, two years and a half before the temporary withdrawal by the Secretary of the Interior, and three years and a half before the presidential proclamation. Therefore, at the date of those alleged withdrawals, the lands were vested in the state of Oregon by virtue of the school land grant act and the approval of the Surveyor General of Oregon of the field survey on June 2, 1903.

D.

If approval of survey by the General Land Office was required, such approval was made by the official use of this survey for the purpose of identifying these identical lands.

See cases cited and commented on under point B.

E.

Even if the withdrawal by the Secretary of the Interior had force, that was a temporary withdrawal. The subsequent approval of the survey (Jan. 31, 1906) by the General Land office would bring into force the statutes of 1848 and 1859, which being of higher dignity and greater scope than an executive withdrawal would supersede it and vest the lands in the state of Oregon.

"The action of the Land Department cannot over ride expressed will of Congress, or convey away pub lic in disregard or defiance thereof."

Burfenning v. Railroad Co., 163 U.S. 5
and cases cited there.

This act is without exception or qualification. It has never been repealed. The moment the survey was complete the act operated to reserve the lands in question from any other use whatsoever and with the granting act operated to vest title in the state. Certainly it cannot be contended that a mere executive act could have the effect of repealing those statutes. The statutes operate the minute the conditions prescribed exist. The prescribed conditions under all contentions of the government existed January 31, 1906.

F.

The alleged executive withdrawal of these lands, made December 16, 1905, was of no force because if the lands were then surveyed the school land grant had attached, and if they were not surveyed there was no right to withdraw them for forest purposes.

> "There can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the executive department of the government."
>
> Wolsey v. Chapman, 101 U. S. 769.

The acts of the heads of departments within the scope of their powers are in law the acts of the president.

> Idem.
>
> Wilcox vs. Jackson, 13 Peters, 498.

The sole laws authorizing the President to create forest reserves and to withdraw lands for that purpose, are Section 24, Act of March 3, 1891, 26 Stats. 1103 as amended by the act of June 4, 1897, 30 Stats. 3436, and it is under these acts that the reservation for forest uses purports to have been made. (See proclamation of Jan. 25, 1907.) By the acts above cited, the President can set aside only "public lands." See statutes cited above.

> United States v. Blendauer, 122 Fed. 704.

"Public lands" are only such as are open to sale or other disposition under general laws.

> Newhall v. Sanger, 92 U. S. 761, 763.
> Bardon v. Northern Pac. R. R., 145 U. S. 535, 538.
> Barker v. Harvey, 181 U. S. 490.

Lands are not "public lands", i. e., not open to sale or other disposition under general laws until they are surveyed.

> Barnard v. Ashley, 18 How. 43, 46.

Hosmer v. Wallace, 97 U. S. 575, 579.
Buxton v. Traver, 130 U. S. 232, 235.

Now, if the withdrawal or reservation for forest uses can only be made of surveyed lands, i. e., "public lands," then if these lands were unsurveyed on December 16, 1905, as the government now claims, the Secretary of the Interior's withdrawal of that date was unavailing. On the other hand, if on that date the lands in question were surveyed lands, i. e., "public lands," the Secretary of the Interior's withdrawal was equally unavailing, for the reason that the reservation of 1848 and the grant of 1859 took effect on these specific lands as soon as they were identified by survey.

Again, the Secretary's withdrawal was of "vacant, *unappropriated public lands.*" Govt's. Exh. A. Dec. 16, 1905. If these lands were then unsurveyed as claimed by complainant they were not "public lands" and hence not within the terms of the order of withdrawal.

If the lands were then surveyed as we claim, they had *ipso facto* ceased to be "unappropriated." They were expressly "appropriated" to the school grant.

Therefore by the very language of the order of withdrawal, they were not included.

G.

The President's proclamation of January 25, 1907, did not affect these lands because—

(a) At that time the grant was vested in the state of Oregon, and

(b) The proclamation itself expressly excepts the lands in question.

As we have seen, the surveys were approved by the land office January 31, 1906, and by the statute of 1848 were immediately reserved for the use of schools and passed to Oregon under the grant of 1859.

Where lands have been previously reserved or appropriated no subsequent law or proclamation will be construed to embrace them or to operate upon them, although no exception be made in the subsequent proclamation or law.

> Bardon v. Northern Pacific, 145 U. S. 535, 539.
> Railroad v. Roberts, 152 U. S. 114, 119.

The President's proclamation of January 25th did not as a matter of fact include these lands. On the contrary, by its express terms it excluded them. The proclamation in question contains this clause:

> "Excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose for which this reservation for forest uses is inconsistent."

As we have seen, on January 31, 1906, nearly a year prior thereto, the congressional reservation of 1848 had attached to these lands. That reservation was for the use of schools, a use necessarily inconsistent with forest uses. They had also by the act of 1859 been granted for the use of the schools. The intent and effect, both of the act of 1848 and 1859, was to appropriate the lands to Oregon school uses. The lands therefor were directly within the exception in the presidential proclamation.

The learned District Attorney in his brief in the court below says, referring to the words "excepting the withdrawals, reservations," etc., in the proclamation:

> "Those words are used in the proclamation to refer to withdrawals for government purposes, such as Indian reservations, fish hatcheries, military reservations and the like."

The learned District Judge in his opinion dismisses this point with a brief remark (p. 28) "Nor do I think the lands in dispute were excepted from the operation

of the proclamation." The learned District Judge seems to have given no force or effect whatever to the statute of 1848. The contention of the learned district attorney, that the withdrawals and reservations referred to in the proclamation alluded to withdrawals for governmental purposes, such as Indian reservations, fish hatcheries, military reservations and the like, is untenable. If such had been the intent of the proclamation, the President would have so stated; but the language of the President's proclamation is *"Excepting all lands,"* not some lands but *"all lands embraced within any withdrawals or reservations for any use or purpose for which this reservation for forest uses is inconsistent."*

The presidential proclamation was unavailing for another reason. At the time it was made the lands had been surveyed, the survey approved and the plat of survey filed in the local land office. The moment that had been done the prior congressional reservation and grant of 1848 and 1859 operated to reserve and grant these lands to the use of the Oregon schools. And under the rule hereinbefore alluded to, that no statute or proclamation will be held to include lands previously reserved or appropriated, the presidential proclamation was of no force as far as these lands were concerned. We ask that the decree below be reversed and that the bill be dismissed.

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